

INTRODUCTION

TO THE

L A W

O F

T E N U R E S.

Satius est petere fontes quam sectari rivulos. Lord COKE.

*Profunt minus recte excogitata; cum alios incitent saltem ad
veritatis Investigationem.* FULB. A BARTOL.

By SIR MARTIN WRIGHT,
Late one of the JUDGES of the Court of
KING'S BENCH.

THE THIRD EDITION.

L O N ^{g.} D O N;

Printed by his Majesty's Law-Printers;
For J. NOURSE, Bookseller to his Majesty.

M DCC LXVIII,

INTRODUCTION

TX
W9474
ad3

TO THE

W

A

I

O

T E N U R E S

Rec. Jan. 17, 1899.

TO
THE RIGHT HONOURABLE
Sir ROBERT RAYMOND, Kt.
LORD CHIEF JUSTICE of the COURT
of KING'S BENCH,

A N D
One of his MAJESTY'S most HONOURABLE
PRIVY COUNCIL.

MY LORD,

THE Honour you have done this
Treatise, by suffering it to pass
your Lordship's Hands without Cen-
sure, hath encouraged me to offer it to
the Publick under your Protection.

The Deference which is justly paid
to your Lordship's Judgment by the
Students and Professors of the Law in
particular,

iv DEDICATION.

particular, and which is equally due from all, who look into our legal Constitution or Polity, cannot fail to give this Piece a favourable Reception, if, upon a second Reading, your Lordship shall think it deserves your Patronage.

My Lord, while I am thus providing for the Success of my Endeavours, I cannot help boasting the Advantage it gives me of declaring to the World, that I am, with the greatest Respect,

MY LORD,

Your Lordship's

most obedient Servant,

M. WRIGHT.

A N

INTRODUCTION, &c.

TH E Design of this Treatise is to shew the Original, the Establishment, and the Nature of TENURES: And because all that Part of our Common Law, that concerneth TENURES, hath Original from the FEUDAL LAW (a), I propose to prosecute it in the following Method.

I. I shall collect, and throw together [in the best Manner I can] so much of the Law or Doctrine of FEUDS, as seems necessary, and wanting to a right Apprehension of TENURES.

(a) Vide Sir Hen. Spelman's *Posthum. Treatise of Parliaments* 57, 58. *Posthum. Treatise of Feuds and Tenures by Knight-Service* per totum; and *Gloss. ad verbum Feodum*. Crag. de jure feud. L. 1. dieg. 7. And Philips his *Treatise of Tenures in Capite, and by Knight-Service*, per totum.

2 *An Introduction to the*

II. I shall endeavour to discover the Time when, and the Authority or Law it self, by which FEUDS or FEES were established in *England*, and by which the Law of FEUDS became a Part of our COMMON LAW: And shall take occasion to shew that WARDSHIP, MARRIAGE, RELIEF, and the like Fruits [or seeming Grievances] of TENURE were either properly FEUDAL, or that they prevailed among us as such, in Consequence of our own Consent to the Introduction or Fiction of TENURES.

III. I shall consider the main Principles, Qualities, and Rules of TENURE, and shall shew that they are plainly FEUDAL, and that they are to be accounted for only as such.

CHAP.

Law of Tenures. 3

CHAP. I.

AS I do not mean to exhibit a tedious or minute Treatise of FEUDS, I shall not prejudice or perplex the Reader with trifling Etymologies (b), imperfect Definitions (c), or contradictory Glosses: But shall confine my self to such Texts as are generally agreed, and shall offer such an Account of the Policy and Nature of FEUDS in general, as may supply the Want of a formal Definition; and shall barely propose Mr. *Somner's Etymon*, because it seems too rational to be slighted, and is in Truth too good a Basis to be neglected.

(b) Whereof there are many. *Du Fresne Gloss. ad ve b. Feudum. Somner Treatise of Gavelk. 104. Stry Exam. jur. feud. cap. 2. §. 1. Crag. de jure feud. 40, 41.*

(c) It being impossible to warrant, or suggest the several Kinds of Modern or improper Feuds, within the Compass of any Definition or Description whatsoever: Upon which Account the Feudists say, that *Omnis definitio in jure periculosa est. Vid. Crag. de jur. feud. 42, 43. Zasius in usus feud. 3.*

4 *An Introduction to the*

Mr. Somner then supposes, that the Word "*Feud* is a German Compound, " which consists of *Feb*, *Feo* or *Feob*, " signifying a Salary, Stipend or " Wages (d), and of *Hade*, *Head*, or " *Hode*, importing Quality, Kind, " or Nature (e); so that (says he) " *Feudum*, *Fee*, or Land holden in " *Fee*, is no more (considered in its " first and primary Acceptation) than " what was holden in *Fee-hode*, by " Contraction *Feud* or *Feod*, i. e. in " a stipendiary, conditional, merce- " nary Way and Nature, with the Ac- " knowledgment of a Superior, and a " Condition of returning him some " Service for it, upon the With- " drawing whereof, the Land was re- " vertible unto the Lord (f)". This *Etymon* not only suggests the most probable Account of the Word, but

(d) Vide Schilt. Cod. jur. Aleman. de nat. Succession. feudi, Cap. 1. Sect. 3. & Comment. ad Rubr. Sect. 7. and Spelm. Posthum. Treatise of the ancient Government of England 51.

(e) Somn. Treatise of Gav. 106,—108. Vid. Spelm. Gloss. ad verb. Feodum.

(f) Somn. Treatise of Gav. 110, 111.

gives

Law of Tenures. 5

gives us the clearest Description of the Thing it self, and is agreeable to the *Book of Feuds* (g), which says, that *Beneficium* (*Feudum scilt.*) (h) *illud est, Quod ex benevolentia ita dabatur alicui, ut proprietas rei penes dantem remaneret, ususfructus ad accipientem ejusq; hæredes pertineret ad Hoc, Ut ille & ejus hæredes Domino fideliter servirent* : The Sense whereof is thus expressed by Mr. *Selden*, viz. “ *Feuds* or *Feuda* being the same, “ which in our Laws we call *Tenancies* or *Lands held*, and *Feuda* also, “ are Possessions so given and held “ that the Possessor is bound to do “ Service to him, from whom they “ were given (i).

This Service was originally purely Military (k), and the Possessor's or Feudatary's *Homage* or *Fealty*, was

(g) *Feud. Lib. 2. Tit. 23.*

(h) Feuds were antiently called *Beneficia*, ut *infra* p. 19. Hence many Ecclesiastical Feuds are to this Day called Benefices. *Vide Spelman's Posthum. Treatise of Feuds* 9.

(i) *Seld. Tit. of Honor* 273.

(k) *Vide infra* 19, 27.

6 *An Introduction to the*

(as it seems) in the *Infancy of Feuds*, a Kind of military Engagement, rather implied than expressed (l), to be faithful to his Benefactor, and also Assistant unto him (m). Sir *Henry Spelman* therefore calls a *Feud*, *Prædium militare* (n), and Mr. *Somner* says (o), that every Inheritance is improperly and corruptly called a *Fief* or *Fee*, that is not holden *Militiæ gratia*, the Ground of all *Fees* (p).

To manifest the Truth of this Assertion, it is necessary to take a short View of the Original of *Feuds*; which were a military Policy of the northern conquering Nations (q), devi-

(l) Vide infra 27.

(m) *Seld.* Title of Honor 274.

(n) *Posthum.* Treatise of Feuds 6.

(o) *Treatise of Gav.* 49.

(p) *Feudorum inventum peperit rei Militaris necessitas.* *Spelm.* Gloss. ad verb. *Feudum*.

Omnia Feuda ad militiæ subventionem expeditiorem inventa sunt. *Gregorii Syntagma jur. Univ. Lib. 6. Cap. 4. Sect. 1.*

(q) *Constat Feudorum originem a Septentrionalibus Gentibus defluxisse, &c.* *Crag. de jure feud. 25, 375. Schilt. Com. ad jus Feud. Alaman. 8. Seld. Title of Honor 274. Spelm. Gloss. ad verb. Lex. Hic contractus [scilicet Feudalis] proprius est Germanicarum Gentium, neq; usquam invenitur, nisi ubi Germani sedes posuerunt.* *Grot. de jure Belli & Pacis Lib. 1. Cap. 3. Sect. 23.*

Law of Tenures. 7

fed as the most likely Means to secure their new Acquists, and were large Districts or Parcels of Land given or allotted by the conquering General, to the superior Officers of his Army, and by them dealt out in less Parcels to the inferior Officers, and most deserving Soldiers (r): These Allotments or Portions of Victory naturally engaged such as accepted them to defend them; and as a Part could not be preserved independent of the Whole, all Givers, as well as Receivers, were mutually and equally concerned to defend the Whole; but as

(r) *Cum ex Septentrione (quam Plinius officinam gentium verissimè dixit) Innumerae Gentes domi inopia rei familiaris pressae egredierentur novas sedes petiturae, Gothi, Vandalii, & Hunni, tandem etiam Longobardi [ut de aliis taceam] Imperium Romanum diripuissent, Regiones ex hoste captas militari more inter se diviserunt, ut non minor Inferiorum quam Principum in his Expeditionibus haberetur Ratio, &c.* Crag. de jure feud. 19, 20, 376. And Sir William Temple speaking of the Saxons says, That their Princes or Leaders of their several Nations, became *Konings* or Kings of the Territories they had subdued, and that they reserved Part of the Lands to themselves for their Revenue, and shared the rest among their chief Commanders by great Divisions, and among their Soldiers by smaller Shares. *Temp. Introduc. to the Hist. of England* 65.

8 *An Introduction to the*

that could not be done in a tumultuary Way, Order, and to that End a military Subordination was necessary; and therefore each Receiver was supposed, in Consequence of his Acceptance of any Portion, to oblige himself as long as he held it, to attend to, and enter into Measures for the Security and Defence of the Whole, whensoever he should be required (f) by his Benefactor or immediate Superior, and was likewise supposed to be accountable to him as his Commander or Leader, for his Attendance, and a faithful Discharge of his Duty: Such Benefactor or Superior was likewise subordinate to, and under the Command of his Benefactor or Superior, and so upwards to the Prince or Chief himself. Thus a proper military Subordination was naturally and rationally enough inferred and established; and an Army

(f) *Quantum ad servitia præstanda—Vasallus quamdiu feudum tenet, & non ultra, Domino jussu bella moventi tenebitur—Præstabit autem ea servitia non nisi requisitus. Zasius in usus feud. f. 29.*

Law of Tenures. 9

of Feudataries were, as so many Stipendiaries, always on Foot, ready to muster and engage in the Defence of their Country (t): So that the feudal

(t) *Loyseau's Account of the Distribution of Gaul among the Franks being of this Nature, I shall here transcribe the Substance of it, viz. Quant au terres de la Gaule, Les Francois victorieux les confisquerent toutes.—Et hors celles, qu'ils retindrent au Domaine du Prince, ils distribuerent toutes les autres par Climats & territoires aux principaux Chefs & Capitaines de leur Nation. Donnant a tel toute une Province a titre de Duchè: a tel autre un pays de Frontiere a titre de Marquisat: a un autre une ville avec son territoire adjacent a titre de Comtè: bref à d'autres des Chasteaux ou villages avec quelques terres d'alentour a titre de Baronne, Chastellenie, ou simple Seigneurie, selon les merites particuliers de chacun, & selon le nombre des soldats qu'il avoit sous luy; car c'estoit tant pour eux que pour leurs soldats—Ils ne concederent pas ces terres a leurs Capitaines pour en jouyr en toute Franchise, & sans prestation ou redevance aucune, ains les concederent a titre de Fief, c'est a dire a la charge d'assister a tous jours le Prince Soverain en guerre.—Et non seulement le Prince Soverain des Francois conceda a ses Capitaines tant pour eux, que pour leur soldats, les terres de leur partage a titre de Fief vers luy: mais aussi ces Capitaines baillerent a chacun de leurs soldats la part, qu'il leur en voulurent conceder, a mesme titre de Fief vers eux, c'est a dire a la Charge qu'ils seroient tenus les assister en guerre toutefois & Quantes qu'il en seroit besoin, & par ce moyen leurs compagnies demurerent entieres pour jamais.—Ces Capitaines avoient le commandement & puissance publique en qualite d'officiers, estant tous jours demeurez en leur charges de Capitaines, En tant que par le moyen des Vassaux, qu'ils avoient sous eux, leur Compagnies & bandes estoient maintenues a perpetuite, & de faict aux livres des Fiefs ils sont appelez Capitanei Regis aut Regni. Loyseau Traite de Seigneurie 13, 14, 16.*

Returns

IO *An Introduction to the*

Returns of *Fealty*, or mutual Fidelity, and Aid were not originally *ex pacto* (u), but seem to have been politick, or rather natural, Consequences drawn from the apparent Necessity, these warlike People were under, of maintaining their Ground with the same Spirit, and by the same Means they had got it. But as the Princes of *Europe* were every Day more and more alarmed by the Progress of the northern Standard, many of them went into this or a like Policy, as the strongest Intrenchment; and in Imitation of it, they, reserving the *Dominium* or *Propriety* of the Lands they gave, parcelled out some of their own Possessions or Territories under an *express Fealty* (w), engaging their

(u) Renders (or Services as now called) were not originally *ex pacto vel condito*, for that was but *Cautela superabundans*, but of common Right. *Spelm. Treat. of Parliaments* 57.

(w) *Laborante seculo antiquiori bellis undequaque gravissimis, Imperatores, Reges, Principes consultius ducunt patriciis & magnatibus suis [quos Capitaneos vocabant] Regiones integras, præsertim finitimas & hosti expostas distribuere, non ut sibi has Integre possidentes opes eraderent: Sed*

Law of Tenures. II

their Beneficiaries or Feudataries, to make them like Returns of Fidelity and Aid, as followed from the Design and Nature of an *original Feud* (x), from whence the feudal Obligations probably began to be considered as *Renders*, or *Services of Render*, calculated for the Benefit of the Proprietary, who was, in respect of the *Dominium* or *Propriety* remaining in him, from henceforth called *Dominus* (y).

The

Sed ut distractas in idoneas portiones singulas singulis militibus [habito personarum respectu] Feudi, i. e. stipendii nomine elocarent; Qui & cum ipsis patriam unanimiter tuerentur [fidei Interposito jurejurando] & Militanti Principi in auxilium venirent evocati. Spelm. Gloss. ad verb. *Feodum*.— The same Author (in his *Treatise of Parliaments* 57, 58.) supposes, that the King of England did in the Beginning portion out the Lands of England in this Manner: And the Lord Coke asserts, that the first Kings of this Realm had all the Lands of England in Demesne; and *les grand Mannors & Royalties* (says he) they reserved to themselves, and of the Remnant they, for the Defence of the Realm, infeoffed the Barons of the Realm, &c. 1 *Inst.* 58. b. 2. Of these Opinions, *inf.* 29, &c.

(x) *Ego Titius juro—Quod ab hac hora ero Fidelis—sicut debet esse Vasallus Domino.* Feud. Lib. 2. Tit. 7.

(y) *Dominus appellatur is, Qui feudum in re sua alteri fruendum constituit, idcirco ut vulgo creditur, quia rei in feudum datæ dominium & proprietatem retinuit, solum usum-*

12 *An Introduction to the*

The feudal Policy having obtained thus far, the few Countries that had not [as above] gone into it confederated themselves *Prince* and *People*, as *Lord* and *Feudatary*, to stand by and assist each other in Cases of common Danger and Concern: (2) In Consequence whereof, and of the *Fealty* expressed or implied in such Confederacy, every Man's Possession was considered as a FEUD or *Stipend*, and became as such a Pledge or Security for the due Observance of his *Fealty* (a); so that the feudal Policy thus

usum-fructum Feudi nomine concessit. Hotoman. de verb. Feudal. sub verb. *Dominus*.

Dominus in Jure definitur, Qui proprietatem rei habet. Crag. de Jure feud. 43.

Thus the *French* Words *Seigneur* and *Sieur*; and the *English* Words *Sire* and *Sir*, are all of them Appellations respecting Propriety. *Vide Loyseau Traité des Seigneuries* 5, 6.

(2) Whether this was not our Case in *England*, will be inquired hereafter, p. 58, 78.

(a) Note; That *Fealty*, whether implied or expressed, was an Engagement between the *Superior* and *Inferior*, or *Lord* and *Feudatary*, (as now called) mutually to comply with the several Obligations resulting from the Nature of an *original Feud*; for though *Fealty*, when express, was sworn only by the *Feudatary* and is explained in the *Book of Feuds* (*Lib. 2. Tit. 4.*) to be *Jus-jurandum*

thus hinted, and thus advanced, was now become the military Policy of the western Parts of the World (b); and military Aid or Service (as now called) was understood to be the real or fictitious Terms of all Propriety or Possession in *Europe*.

This general View of the Original and Progress of FEUDS, being sufficient to suggest their Nature; I shall now proceed to the Doctrine of FEUDS,

jurandum quod a vasallo præstatur Domino: Yet that it was binding on both Sides, appears from the most authentick Explications of this Engagement: Thus according to the *Book of Feuds* (Lib. 2. Tit. 6.) *Qui Domino suo fidelitatem jurat, ista sex in memoria semper habere debet, Incolume, tutum, honestum, utile, facile, possibile* — *Sed quia non sufficit abstinere a malo, nisi fiat quod bonum est, restat ut in sex prædictis concilium & auxilium Domino præstet: Dominus quoq; in his omnibus vicem fidei suo reddere debet*: And thus according to *Ravenna* (in *Consuetud. Feud. Lib. 2. Tit. 6. p. 115.*) *Dominus non tenetur jurare Vasallo fidelitatem, sed in effectu tenetur sibi in tantum absq; sacramento, in Quantum tenetur Vasallus Domino cum sacramento* — *Et vice mutua est obligatus Dominus Vasallo suo virtute dictæ fidelitatis (scilicet) a Vasallo juratæ. Vide Crag. de jure feud. fo. 44, 45. Hanneton de jure feud. L. 1. Cap. 13.*

(b) Sir Henry Spelman calls the feudal Law the Law of Nations; for so, says he, I may term it then (speaking of very early Times) to be in our western Orb. *Spelm. Posthum. Treat. of Parliaments 57.*

con-

14 *An Introduction to the*

confining my self to such Heads or Branches of it, as most directly lead to the Knowledge of *Tenures*.

FEUDS, *Fiefs* or *Fees* were originally precarious, and held at the Will of the Lord (c); then they became certain for one Year (d), and were some Time after given for Life (e); but though FEUDS were not at this Time hereditary, yet the Vassals or feudal Tenants were called *Nativi*, as if born such; and it was unusual, and even thought hard to reject the Heir of the former Feudatary, provided he was able to do the Services of the FEUD, and the Lord had no just Objec-

(c) *Antiquissimo tempore sic erat in Dominorum potestate connexum, ut quando vellent, possent auferre Rem in feudum a se datam. Feud. Lib. 1. Tit. 1.——Statim ab initio originis feudorum in Domini feudum concedentis potestate fuit, feudum concessum quancumq; vellet precarii instar, revocare. Hanneton de jure feud. 139. Somn. Treat. of Gav. 108.*

(d) *Postea vero eo ventum est ut per annum tantum firmitatem haberent. Feud. Lib. 1. Tit. 1.——Deinde usu inolevit ut per annum integrum Feudum semel concessum firmitatem haberet. Hanneton de jure feud. 139.*

(e) *Deinde Statutum est ut usq; ad vitam Fidelis produceretur. Feud. Lib. 1. Tit. 1.——Postea vero eo ventum est, ut ad Recipientis vitam perduraret. Hanneton de jure feud. 139.*

tion

tion against him (f) : But though the Lord did not remove the Heir from the FEUD, yet it is not likely that he succeeded absolutely as of Course ; but that he paid a Fine, or made some Acknowledgment, in the Nature of *Relief* (g), for the Renewal of the FEUD ; and though such Fine or Acknowledgment was originally made to secure the Succession, which was then arbitrary, and at the Will of the Lord ; yet it was continued even after FEUDS became hereditary (h), and is

(f) *Licet Hæreditaria Successio tum non erat in feudis, Nativi tamen hi Tenentes dicebantur ut apud Nos hodie, quos nisi justa offensæ causa præcesserit, & ad serviendum non sufficerent, durum erat a suis possessionibus remove. Crag. de jure feud. 20, 21.*

(g) *Relevium est præstatio hæredum, Qui quum veteri jure feudali non poterant succedere in feudis, caducam & incertam hæreditatem relevabant, soluta summa vel pecuniæ vel aliarum rerum pro diversitate Feudorum. Schilt. Cod. de Bonis Laudemialibus, Sect. 52. — According to Hotoman, Relevium dicitur Honorarium, quod novus Vasallus Patrono introitus causa largitur, quasi morte alterius Vasalli, vel alio quo casu feudum ceciderit, quod jam a novo sublevetur. Vide Hot. de verb. feudal. Et Gloss. ad X. Scriptores ad verb. Relevium.*

(h) Thus in Germany, the old acknowledgment was continued by an express Provision in the Constitution, by which Feuds were made hereditary, viz. *Servato usu majorum Valvasorum in dandis Equis & armis suis Senioribus. Vide Feud. Lib. 1. Tit. 1. Et Leges Longobard. Lib. 3. Tit. 8. Sect. 4.*

well

16 *An Introduction to the*

well known at this Day (tho' by several Names) in most Countries.

FEUDS were afterwards extended, beyond the Life of the first Vassal or feudal Tenant, to his Sons or some one of them, whom the Lord should name (i); but in such Case the feudal Donation (k) was not extended beyond

(i) *Sic progressum est ut ad filios deveniret in quem (scilicet.) Dominus hoc vellet beneficium confirmare.* Feud. Lib. 1. Tit. 1. — *Proindeq; receptum ut ad eos Vassalli filios quibus id beneficii feudi Dominus concessisset deveniret, & postmodum temporis tractu inductum est ut ad omnes Vassalli filios masculos Intestata feudi Successio æqualiter pertineret.* Hanne-ton de jure feud. 139. Schilt. Cod. de nat. Succ. feud. Cap. 1. Sect. 5.

(k) Though the Feudists have generally considered Feuds as mere Donations: Yet Mr. Somner (*Treat of Gov.* 111.) says, that the feudal Grant, in respect of the incident Services, is improperly called a Donation, being but *feudalis dimissio*, i. e. a Demise in Fee: But still the Feudists did properly enough call it a Donation. 1st, Because it was not originally supposed to be made for any immediate or contracted Equivalent; and the Services were rather Consequents of the Relation arising from the Feud or the general feudal Policy, (*ut supra*) than immediate Returns, in Consideration of the Feud or Benefit conferred by the Lord; and thus Grotius must be understood, when he says (in his *Treatise de jure Belli & Pacis* Lib. 2. Cap. 12. Sect. 5.) that *in feudali contractu rei feudalis concessio beneficium est, Pactio autem militaris operæ pro tutela est, facio ut facias.* 2^{dly}, Because as the Lord had the free Choice of his Vassal, and confer'd the Feud on whom he pleased, and the Services of the Feud were not so much calculated for the particular Advantage

beyond the Words by any presumed Intent, but was taken strictly (l), in-
somuch, that if the Donation was to
a Man and his Sons, all the Sons suc-
ceeded *in Capita*; and if one of them
died, his Part did not descend to his
Children, or survive to his Brothers,
but returned to the Lord (m): In Pro-
cess of Time Grandchildren succeed-
ed to Sons, and Brothers to Brothers
(n), if the FEUD was *antiquum aut*
C pater-

vantage of the Lord, as for the Defence of the Commu-
nity united under a feudal Policy; the Preference given,
and Interest moving from the Lord, was a Benefit confer-
red in such a Manner, that in respect to the Lord, It might
very well be called a Donation: *Et licet* says Crag. (de
jure feud. 42.) *Feuda aliter hodie comparentur, interveni-*
ente sæpissimè pretio, aut alia re pro pretio, Denominatio ta-
men fit ab eo quod prævalet—— *Et Quamquam pretio inter-*
veniente, tamen justum pretium nunquam numerasse præsumi-
tur, Qui se fidelitatis & obsequii vinculo alii astringit; vin-
culum enim hoc obsequii pro parte pretii est: Itaque feudum li-
berum & gratuitam donationem definimus ad illud quod fieri
debet attendentes, non ad id quod in hoc corrupto sæculo apud
degeneres homines in usu frequenti videmus.

(l) *Feudum ex sua natura est species quædam Donationis,*
& æquum est ut omnes Donationes sint stricti juris, ne quis
plus donasse præsumatur, quam in Donatione expresse-
rit. Crag. de jure feud. 50.

(m) Crag. de jure feud. 21, 22.

(n) *Postremo vero Lege a Conrado Imperatore promul-*
gata (feud. Lib. 5. Tit. 1.) ad Nepotes ex filiis masculis
hoc

18 *An Introduction to the*

paternum, that is to say, not newly purchased, but came to the Brother, by Discent from his Father: But if the FEUD was what the Feudists called *Novum*, that is to say, newly purchased or acquired by a Brother, a Brother should not succeed to it; unless it was by Virtue of an express Provision in the Constitution of the FEUD (o). And at length not only Descendents in the direct Line succeeded *in Infinitum*, but Collaterals also without Regard to their Degree, provided they were descended from, and were of the Blood of the first Feudatary (p).

Sir

hoc ipsum productum fuit. Hanneton de jure feud. 139, 140. — Cum vero Conradus Romam proficisceretur petitum est à fidelibus, Qui in ejus erant servitio, ut Lege ab eo promulgata, hoc etiam ad Nepotes ex filio producere dignaretur, & ut frater fratri sine legitimo Hærede defuncto in Beneficio quod eorum patris fuit, succedat. Feud. Lib. 1. Tit. 1, 19. Lib. 5. Tit. 1. Spelm. Posthumous Treatise of Feuds 4. Crag. de jure feud. 21, 22.

(o) Feud. Lib. 1. Tit. 1, 8, 14, 20. Lib. 2. Tit. 12. 90. — Crag. de jure feud. 22, 163, 242.

(p) *Tandem factum est ut Feuda non solum ad Descendentes in perpetuum transirent, sed etiam ut ad Collaterales, Qui ex primo Vasallo descendebant, in Infinitum*

Law of Tenures. 19

Sir *Henry Spelman* says (q), That these several Conditions of FEUDS had their several Denominations, that is to say, while they were precarious they were called *Munera*; afterwards when they became temporary and for Life, they were called *Beneficia*; and that they were first called *Feuda* when they began to be granted in Perpetuity, and not before: And agreeably to this, Mr. *Somner* calls *Beneficium*, *Feudum*'s elder Brother, and says that *Feudum* was a Word not known until about the Year 1000 (f).

FEUDS being thus established, and all feudal Possession being at this Time of military Obligation, and in the Hands of military Persons, who, being under frequent Incapacities to cultivate and manure their own Lands, found it necessary to commit Part of

tum continuarentur. Crag. de jure feud. 22, 50, 242, 243, 244. Feud. Lib. 1. Tit. 1. Shilt. de Nat. Succession. Cap. 1. Sect. 8. Spelm. Posthum. Treatise of Feuds 4, 5. Zasius in usus feud. 46.

(q) Vide Spelm. Posthum. Treatise of Feuds 4, 6, 9.

(f) Treatise of Gavelkind 102. Vide Shilt. de Nat. Succ. Cap. 1. Sect. 3.

20 *An Introduction to the*

them to such Persons as, having no feudal Possession of their own, were glad to possess them upon any Terms: To such Persons therefore they gave some small Portions of their Lands, obliging them to such Returns of Service, Corn, Cattle or Money (u), as might enable them to attend to the feudal Duties, without Interruption from Affairs of a lower Nature, and of mere private Concern: By means whereof the feudal Policy was considerably extended, in regard that all Persons accepting any Kind of Interest in a FEUD, did not only implicitly engage to do nothing to the Prejudice of it, but were, under an express or implied *Fealty*, obliged to answer the stipulated Renders, and to promote the Peace and Welfare of the *feudal Society*.

These, and such like Interests, being in this View considered as

(u) Vide Crag. de jure feud. 20, 65. Loyseau Traite des Seigneuries 15.

Law of Tenures. 21

FEUDS (w), the ancient *feudal Simplicity* branched out into great Variety, and gave Way to so many Devices, that it became a necessary Rule or Direction of the Law of FEUDS, that in the Consideration of a feud *Tenor* (x) *Investituræ est inspiciendus*, and that for the Reason expressed in a

(w) *Qualitercunque datum fuerit (Feudum) sive ad proprium, sive ad Libellum, Licet propriam feudi naturam non habeat, jure tamen feudi censebitur.* Feud. Lib. 2. Tit. 44, 48. *Nec obstat quod Feudum improprium non sit Feudum, censetur tamen jure feudi, hinc & statuta de feudis loquentia, etiam ad impropria spectant.* Stry. Exam. jur. feud. Cap. 3. Q. 2. *Quod in materia feudali ea, quæ statuuntur in milite, habent locum in non Milite, & intelliguntur etiam pro quolibet simplici Vasallo.* Ravenna in Consuetud. feud. 64. And according to Zasius, *Si Vasallo feudum ita concedatur, quod pro servitiis annuam vini, frumenti, pecuniæ pensionem præstare possit, & ad alia servitia non teneatur, Ea conventio a feudo degenerat cujus est Natura ut incerta sint servitia (addas & Militaria): In aliis tamen feudum remanet, quia Obligationem servitiorum in aliud onus commutare, non est contra substantiam feudi.*—*Nam feudi substantia est, Vasallum esse Fidelem, & Domini rebus, bonis, honori, vitæ, non insidiari, feudumque a Domino recognoscere.* Zasius in usus feud. 117, 121.

(x) *Tenor est pactio contra communem feudi naturam ac rationem in contractu Interposita.* Hotoman. de verb. feud. In verb. Tenor. Feud. Lib. 2. Tit. 2. Sect. 2.—*Tenor est qui dat Legem feudo, & plerumque naturam feudi mutat.* Crag. de jur. feud. 50. Zasius in usus feud. fol. 123.

22 *An Introduction to the*

like Maxim of our Law, *Modus legem dat Donationi.*

X The Feudists therefore in order to preserve the genuine Notion of a pure original FEUD, and to digest as far as possible, the various new invented FEUDS, or Forms of Donation, have drawn up several Systems (y) of FEUDS, which they principally divide into *Feuda propria vel recta*, & *Impropria vel Degenerantia* (z).

(y) The first of them are to be found at the End of the *Corpus Juris Civilis*, and are supposed to have been written by *Gerardus Niger* and *Obertus de Orto*, about the Year 1170. (or 1154. according to *Barbeyrac*, Notes on *Puffendorf de jur. nat. Lib. 4. Cap. 8. Sect. 12.*) at the Command of the Emperor *Frederick*: But *Crag.* takes them to have been only *tumultuariè conscripti ex adversariis sive Schedis Gerardi & Oberti relicti*, ab alio quam ipsis collectis; *Obertus enim & Gerardus*, prout quæque facti species occurrerat, consulti quid de eo sentirent, scripto declararunt: *Hæc eorum Adversaria post eorum excessum aliquis Juris feudorum Studiosus in Libros redegit sine Delectu, sine Methodo.* Vide *Crag. de jure feud. 26, 27. Hanneton. de jur. feud. Lib. 1. Cap. 1.*

(z) *Prima Feudorum Divisio est in proprium & improprium, & hæc quidem præcipua & primaria divisio est, a quâ reliquæ (licet alio respectu) dependent, & ad eam reducuntur.* *Crag. de jur. feud. 51. Stry. Exam. jur. feud. Cap. 3. Q. 1, 2.*

Under

Law of Tenures. 23

Under the Head of *Feuda propria vel recta*, they treat of the Nature and Qualities of a *pure original Feud* (a), and under the Head of *Feuda Impropria & Degenerantia*, they treat of all *limited* or *qualified Feuds*, any way deviating from (b) the Simplicity of an *original FEUD*: And tho' this Division doth in Truth comprehend and take in all Kinds of FEUDS, yet the Feudists have subdivided them into several Species (c), suggesting by various Additions, the Dignity or Privileges of the FEUD; its Continuance or Course of Succession,

(a) *In quo nullibi a communibus juris feudalis regulis receditur, sed naturalia sua ubique salva nec ulla pactione restricta retinet.* Stry. Exam. jur. feud. Cap. 3. Q. 3.

(b) *Feudum Improprum est quod a propria Feudi natura recedit ex pacto & conventionione contrahentium.* Stry. Exam. jur. feud. Cap. 4. Q. 1. *Improprum id Feudum dicitur Quod a naturali feudi Qualitate declinat, & quod pacto & conditionibus vel obsequiis nominatim est alligatum, contraque innatas Feudi Qualitates impropriatur.* Crag. de jur. feud. 51. Zasius in usus feud. 112, 113.

(c) *Feudum vel ab effectu vel aliqua causa efficienti vel formali in multas species dividitur.* Cowel. Inf. Lib. 1. Tit. 2. Sect. 5,—12. *Quam diversa Feudorum sit natura, colligi potest ex eo quod a nonnullis juris Feudalis Doctoribus 110 Feudorum genera enumerentur.* Beust. Com. ad Stry. Exam. jur. feud. 47.

24 *An Introduction to the*

or the Qualifications and Condition of the Feudatary, or his Manner of acquiring it, or otherwise expressing some Quality seperadded to, or intrenching upon the Purity and Simplicity of a proper genuine FEUD. In one or other of these Views, the Reader will readily apprehend the most usual Divisions or Distinctions of FEUDS, as *Feudum Nobile* (d) & *Ignobile* (e), *Ligium* (f) & *non Ligium*.

(d) *Nobile feudum vocant in jure quod a principe qui superiorem non agnoscit conceditur*——Cum dignitate & jurisdictione.——Crag. de jure feud. 56. Et quod possessorem suum nobilitat, vel eum qui prius erat, nobilem ostendit. Zasius in usus feud. fol. 5.

(e) *Ignobile, quod a minimis Valvasoribus vel etiam a plebe paganis—in feudum conceditur.* Zasius in usus feud. fol. 5.—Quod alias vocatur *Feudum Burgense*. Stry. Exam. jur. feud. Cap. 3. Q. 36, 37. So that in Truth (as Sir Henry Spelman says) *Feudum ignobile nobili opponitur, & proprie dicitur quod ignobilibus & Rusticis competit, nullo Feudali privilegio ornatum:—Quod—Nos Soccagium dicimus—Nonnulli Burgense vocant.* Vide Spelman and Du Fresne Gloss. ad verb. *Feodum & Feudum*.

(f) *Quod a Principe superiorem non agnoscente confertur Feudum Ligium dicitur.* Crag. de jur. feud. 79. Quando Vasallus Domino fidelitatem contra omnes sine exceptione promittit. Stry. Exam. jur. feud. Cap. 3. Q. 40. Et talis fidelitas ei tantum debetur, Qui superiorem non agnoscit. Crag. de jure feud. 57. Seld. Tit. of Honor, 38, 39.

um (g), Francum (h) & non Francum,
Reale & personale, vel perpetuum &
temporale (i), Ecclesiasticum (k) & se-
culare (l) Antiquum seu Paternum (m)
& Novum (n), Dividuum & Indivi-
duum

(g) Quod de alio quam de principe tenetur, feudum non
Ligium (dicitur). Crag. de jure feud. 79. Et in quo
semper excipitur persona primi Domini. Crag. ibid. 57.
Quando Vassallus non indistincte sed hoc vel illo excepto ad
fidelitatem Domino præstandam se obligat. Stry. Exam. jur.
feud. Cap. 3. Q. 42.

(h) Quod ab omni servitio liberum est, cujus rara aut
potius nulla in ipso textu mentio fit, frequens tamen apud
Doctores. Crag. de jure feud. 52. Stry. Exam. jure feud.
Cap. 4. Q. 30. Vide Loyseau's Account of the Original
of Franc Fiefs. Loyseau Traite des Seigneuries fol. 15.

(i) Crag. de jure feud. 53. Zasius in usus feud. 5.

(k) Ecclesiasticum dicitur triplici respectu, tum quod ab
Ecclesia datur, tum quod ab ea recipitur, et tertio quod datur
& recipitur a Clerico, Licet non tanquam ab Ecclesia. Za-
sius in usus feud. fol. 6. — Et quod in re Ecclesiæ con-
stituitur. Stry. Exam. jur. feud. Cap. 3. Q. 24. Vide
Crag. de jure feud. fol. 55.

(l) Quod a secularibus datur & recipitur. Zasius in usus
feud. fol. 6. — Et quod in re seculari constituitur. Stry.
Exam. jur. feud. Cap. 3. Q. 25.

(m) Paternum sive antiquum feudum id dicitur, in quo
quis patri, avo aut alicui majorum succedit. Crag. de jur.
feud. fol. 55. Quod jure successionis ad aliquem devolutum.
(Stry. Exam. jur. feud. Cap. 3. Q. 9.) Quicumque ex Su-
perioribus id acquisivit. Feud. Lib. 2. Tit. 50.

(n) Quod de novo acquisitum fuit, & habet initium in
persona Investiti, nec a Progenitorum successionem provenit.
Zasius in usus feud. fol. 6. Crag. de jure feud. fol. 55.
Hanneton. de jure feud. 30. Stry. Exam. jur. feud. Cap. 3.
Q. 12.

26 *An Introduction to the*

duum (o), *Masculinum* (p) & *Fæmineum* (q). These Divisions or Distinctions of FEUDS thus hinted, need not be particularly considered; because I shall, under the Heads of *proper* and *improper*, have Opportunity to suggest so much of the Nature, and such of the Qualities, of FEUDS in general, as will sufficiently evidence and explain the great Diffi-

As this Division is the Foundation of the Distinction, and Differences taken in our Law, between Estates by Discent and by Purchase, and I shall have little Occasion hereafter to consider it in this View; I shall here give the Reader the feudal Notion of it in *Zafius* his Words, (*viz.*) *Feudum sive sit antiquum sive novum dum nihil aliud accedat, a feudi recti natura non recedit; Licet Qualitates inter sese differant, quod nova dicuntur et paterna, & quod alterum in successione est potentius, quia ad agnatos protenditur, alterum infirmius quod ad latera non porrigitur.* *Zafius* in *usus feud.* fol. 124. *In jure enim Descendentes tantummodo succedunt in feudo novo, itaque feudum novum ad Collaterales ex parte patris nunquam pertinebit, cum in feudo antiquo etiam Collaterales succedant.* *Crag. de jure feud.* fol. 55.

(o) *Feudum Dividuum vel Divisibile id dicitur quod in partes dividi potest, & Individuum vel Indivisibile quod in partes divisionem non admittit.* *Crag. de jure feud.* 58. *Zouchei descript. Jur. temp. par. 2. Sect. 2.*

(p) *Quod ad masculos tantum transit, Quod in feudo regulare est.* *Zafius* in *usus feud.* fol. 6.

(q) *Quod vel a fæmina descendit vel in quod fæminæ succedunt.* *Crag. de jure feud.* fol. 52. *Quod ad fæminas extenditur.* *Zafius* in *usus feud.* fol. 120.

culties,

Law of Tenures. 27

culties, and the Reason of our *English Tenures*.

First then, *proper* FEUDS are such, and such only as are purely military (r), and at this Time hereditary (f), and such as in all Respects preserve the Nature of an *original* FEUD, that is to say, such as are *militiæ gratiâ* generously given without Price (t) or Stipulation to Persons duely qualified for military Service, the requisite Renders or rather Obligations, as so- cial Duties, resulting from the Na-

(r) Vide supra, p. 5, 19.

(f) Though all Feuds were originally precarious (*ut supra* 19.) *Et hæreditarium esse* (says Strykius) *hoc facti est & contra naturam feudi*. Stry. Exam. jur. feud. Cap. 4. Q. 52. Yet now such only as are perpetual, are considered as proper Feuds; *recti autem Feudi natura hæc est, quod ad Hæredes transitorium sit in Infinitum*. Zasius in usus feud. 112. *In jure Longobardico & Alamanico proprium ac rectum illud* (Feudum scilicet) *tantum dicitur, quod pro arbitrio auferri nequit, sed transmittitur*. Schilt. Com. ad Jus feud. Alaman. p. 11. Vide Feud. Lib. 1. Tit. 1. & ibid. in Marg. num. 46, 47. Crag. de jure Feud. 46, 53. & Spelm. Posthum. Treatise of Feuds 5, 6.

(t) *Rectum feudum gratis concedi debet*. Hanneton. sic de jur. feud. 20.—*In feudo nativo & genuino pretium non admittitur, nec merces, aut quid aliud nisi militaris opera*. Vide Crag. de jure feud. fol. 42, 49, 125. *Ex gratia & gratuito Domini beneficio Originem sumpsit* (feudum scilicet rectum). Zasius in usus feud. 112.

ture

28 *An Introduction to the*

ture and Design of a feudal Confederacy (u), being properly uncertain (w) and emergent as the Occasions of War and Defence.

It was the military Nature of these FEUDS, that first rendered *Women* (x) and *Monks* (y) incapable of receiving
OR

(u) Vide supra p. 7. &c.

(w) *Feudorum natura est, ut Incerta sint servitia. Zasius in usus feud. 114. Recti feudi natura est, quod Vasallus fidelitatis sacramento ad Incerta servitia obstringatur. Ibid. 112.*

(x) *Natura ab omni feudo fœminas secludere videtur, quasi ad obsequia Domini quæ vel in consulendo vel in militando consistunt, quorum præcipue causa Feuda constituuntur, Impares & ineptas. Crag. de jure feud. 48, 50. Fœmina ab omni feudo tanquam inutilis sive inhabilis excluditur—neque enim ad munera militaria pro quibus solis feuda dabantur, earum opera Dominus uti potest: Nec arma tractare norunt, quod proprium est Vasallorum: Neque in consilia Domini admitti Mulier potest, cum quæ audit reticere nesciat. Ibidem 236. Fœminæ enim regulariter feudorum capaces non sunt, utpote ad servitia inhabiles. Stry. Exam. jur. feud. Cap. 4. Q. 4. Cap. 15. Q. 3.*

(y) *Qui Clericus efficitur aut votum Religionis assumit, hoc ipso feudum amittit. Feud. Lib. 2. Tit. 26, 30. Eo quod desit esse Miles sæculi, qui factus est Miles Christi*——*Nec beneficium pertinet ad eum qui non debet gerere officium. Feud. Lib. 2. Tit. 21, 109. And the Law was the same in England while Monckery prevailed here; but an Englishman professed abroad was always, and is now capable in England, (2 Roll's Abr. 43. C. 1 Inst. 132. b.) and this was the better Opinion in Sir Lawrence Anderton's Case, debated 12 Dec. 1722. at Serjeants Inn in Fleet-street,*

Law of Tenures. 29

or succeeding to FEUDS of this Sort; and it was in Consequence of the military Relation arising between the Givers and Receivers of such FEUDS, and of the obvious Inducements to the Superior or Lord, to confer such FEUD on this or that particular Person, (which were the military Qualifications and Ability of the Person) that the Feudatary could not alien the FEUD without the Consent of the Lord (z); and as he could not alien, so neither could he exchange (a), pledge, mortgage, or otherwise subject it to his Debts (b), and by such,

or

street, upon an Appeal from the Commissioners of the forfeited Estates, notwithstanding it appeared by his own Confession, that he had been a *Benedictine* Monk fourteen Years in *France*.

(z) Vide Feud. Lib. 1. Tit. 13, 21. Lib. 2. Tit. 9, 34, 38, 44, 52, 55. Crag. de jure feud. fol. 339. Lindenb. Coll. legum antiq. inter LL. Longobard. Lib. 3. Tit. 3. Sect. 9. Zasius in usus feud. fol. 68, 69.

(a) *Alienationis nomine comprehenditur permutatio*. Crag. de jure feud. fol. 340, *nec permutari feudum possit*. Ibid. fol. 68, 69.

(b) *Feuda non possunt ullo pacto alienari per Vassallos, nec in totum, nec in partem quocunque titulo sive pignoris, Venditionis, sive in Animæ salutem, seu ullo prorsus distractionis genere*———*nec in solutum dari feudum*

30 *An Introduction to the*

or by any other Means put it into the Hands of a Stranger. And as the Feudatary could not alien the FEUD without the Consent of the Lord, so neither could the Lord alien or transfer his *Seignior*y or Superiority to another, without the Consent of his Feudatary (c), for the Obligations of the Superior and Inferior, being mutual and reciprocal (d), the Feudatary was really altogether as much interested in the Conduct and Ability of the Lord, as the Lord was in the Qualifications and Ability of his Feudatary : And as the Lord could not alien, so

dum possit. Zasius in usus feud. fol. 69. *Vasallus feudum suum sine Domini consensu oppignorare aut Hypothecare non potest.* Crag de jure feud. fol. 343. Vide Feud. Lib. 2. Tit. 8, 55. Schilt. Cod. jur. Alaman. Cap. 26. & Com. adinde p. 179, 180.

(c) *Ex eadem Lege descendit quod Dominus sine voluntate Vasalli feudum alienare non potest.* Feud. Lib. 2. Tit. 34. Sect. 1. *Ex jure feudali non minus Dominus prohibetur ab alienatione sui Domini directi sine consensu sui Vasalli, quam Vasallus ab alienatione feudi, & utroque casu pari pœna & hic & ille punitur, ille amissione directi Domini, hic, Utilis.* Crag. de jure feud. fol. 129, 374, 375. Vide Feud. Lib. 1. Tit. 22. Zasius in usus feud. fol. 44, 70. Stry. Exam. jur. feud. Cap. 19. Q. 16.

(d) Vide supra p. 12. Note (a).

neither

Law of Tenures. 31

neither could he exchange, mortgage or otherwise dispose of his Seignior, without the Consent of his Vassal (e). Again, as the Vassal or Feudatary could not alien, so neither could he devise or dispose of the FEUD by *Will* (f), or by any means (when FEUDS were become hereditary) prevent or vary the feudal Course of Succession, which in all *proper* FEUDS belonged to the Sons only (g), (exclusive of Daughters) and to them equally (h) : Until by a Constitution of the Emperor *Frederick*, *Honorary* FEUDS be-

(e) *Omnibus modis prohibemus, ut nullus Senior de beneficio suorum militum, Cambium aut Precarium aut Libellum sine eorum adsensu facere præsumat.* Constitut. Conradi feud. Lib. 5. Tit. 1. Lindenb. Coll. LL. antiq. inter LL. Longobard. Lib. 3. Tit. 8. Sect. 4.

(f) *Certi juris est, neque Feuda testamento relinqui, aut Hæredi vero Testamento præjudicari posse, ratio est, quod feudum non tam a Vasallo testante quam a Domino Legem capiat*———*Extranei Hæredis Institutio est quasi alienatio.* Crag. de jure feud. fol. 131, 340. *Nulla ordinatione defuncti in feudo manente vel valente.* Feud. Lib. 1. Tit. 8. Sect. 1.

(g) *Succedunt Tantum filii.* Feud. Lib. 1. Tit. 8. And Crag. reckons it among the *Naturalia feudorum* that *masculi tantum Hæredes succedant.* Crag. de jure feud. fol. 48, 50.

(h) Feud. Lib. 1. Tit. 8. Schilt. de nat. Succession. feud. p. 6.

came

32 *An Introduction to the*

came Indivisible (i), and as such they, and in Imitation of them *military FEUDS* in most Countries, began to descend to the eldest Son only (k).

Secondly, Under the Head of *Improper FEUDS*, the feudal Writers consider every FEUD (that is to say) every Estate, howsoever acquired or possessed upon Terms of *Fealty*, that doth not in Point of Acquisition, Service, Acknowledgment, Succession and the like, strictly conform to the Design and Nature of a *proper military FEUD*: All FEUDS therefore that are sold or bartered for any immediate or contracted Equivalent (l), or that are granted Free of all Service (m), or in Con-

(i) *Ducatus, Marchia, Comitatus de cætero non dividatur.* Feud. Lib. 2. Tit. 55. Sect. 1.

(k) *Primævo feudali jure hanc de Majoratu seu Senioratu obtinuisse regulam, ut regulariter Senior fratrum Et Reliquos fratres a successione excluderet.* Schilt. Com. ad Cod. jur. Alaman. p. 327.

(l) Vide supra p. 27.

(m) Such *Feud*, though it seems to retain little or nothing of the Nature of a *Feud*, is notwithstanding an *improper Feud*, *Et censebitur jure feudi in omnibus, præterquam in servitii præstatione, nam iisdem causis ac delictis amittitur, sicut alia feuda excepto servitio, quod*

Law of Tenures. 33

Consideration of one or more certain Services (n), (whether military or not military) or upon a *Cens* or *Rent* in Lieu of Service; and all such FEUDS, as are by express Words, in their Creation or Constitution, alienable, or allowed to descend indifferently to Males or Females, are *improper* FEUDS, and are severally treated of by the Feudists under the Heads of

quod ex pacto non debet. Feud. Lib. 2. Tit. 23. Num. 43. in Maig.

Licet Francum Feudum expresse ab omnibus servitiis sit immune, non tamen a maleficiis, quæ aut in faciendo aut in celando consistunt, Vasallum liberat——Hinc fit ut apud nos (scilicet Scotos) non minus in franco feudo quam in aliis, pænæ felonix, purpresturæ, & delictorum quæ his sunt similia, locum habent: Non autem Recognitio ob alienationem majoris partis, cum hæc Alienatio delictum conjunctum non habeat. Crag. de jure feud. 52. Note however that, though this Power of aliening such Feud, may be agreeable to the Customs of Scotland, yet according to Zafius, *Feudum francum inconsulto Domino alienari non possit; Quia si delinqueret (Vasallus) puniri non possit, cum esset ei facultas Feudi alienandi.* Zafius in usus feud. 123.

X (n) *Feuda ad certa servitia data, ut Vasallus Dominum comitetur, eum expectet, serviat, & similes operas præstet, impropria Feuda dicuntur, quia feudorum natura est, ut incerta sint servitia.* Zafius in usus feud. 114. Crag. de jure feud. 46, 48. Feud. Lib. 2. Tit. 51. Sect. 7. Stry. Exam. jur. feud. Cap. 4. Q. 29.

D

X Feuda

34 *An Introduction to the*

Feuda Emtitia (o), *Franca* (p), *Censualia* vel *Emphiteutica* (q), *Alienabilia* (r) & *Fæminina* (f), &c. &c.

It would be a wild and fruitless Attempt to treat distinctly of the several Kinds of FEUDS of this Nature; especially since there are no two Systems or Countries (t) that agree in all Points concerning them: So that I must refer such Persons as are curious, to those Authors who have already wrote of them, and shall content my self to advertise the Reader of these five Things only concerning them.

(o) Zasius in usus feud. 116, 117. Stry. Exam. jur. feud. Cap. 4. Q. 13, 14.

(p) Vide supra p. 25, 32, 33. in Marg.

(q) *Feudum censuale est ubi Vasallus prædium sub promissione fidei accipit, ut loco servitiorum certum censum vel pensionem quotannis præstat.* Stry. Exam. jur. feud. Cap. 4. Q. 35. Schilt. Com. ad Cod. jur. Alaman. 197, 391, 392.

(r) *Feudum alienabile est, quod alicui hac ratione conceditur, ut Vasallus idem in quemcunque alienare vel transferre possit, quod contra propriam Feudi naturam est.* Stry Exam. jur. feud. Cap. 4. Q. 53. Zasius in usus feud. 119.

(f) Vide supra p. 26, 28.

(t) *Fus feudale a seipso pro diversitate locorum & Regionum in quibus usurpatur differt.* Crag. de jure feud. 233.

I. That

Law of Tenures. 35

I. That *Fealty*, the essential feudal Bond, is so necessary to the very Notion of a FEUD, that it is a downright Contradiction to suppose the most improper FEUD to subsist without it (u); but the other Obligations or Properties of an original FEUD, may be qualified, or varied by the *Tenor* or express Terms of the feudal Donation.

(u) *Fidelitas non solum vinculum est feudi sed vera ejus essentia, sine qua nullum Feudum subsistere possit, adeo ut fidelitas ipsa ne pacto quidem remitti possit, alioqui in aliam contractus speciem transit, nempe in allodium.* Crag. de jure feud. 45, 46, 47. Stry. Exam. jur. feud. Cap. 2. Q. 23, ——— *De omni feodo fidelitas præstanda est, siue sit militare, siue Francum, siue Emphyteuticum aut ad Libellum datum.* Crag. ibid. 223. *Quia fidelitas remitti non potest.* Zasius in usus feud. 122. Agreeably hereunto the Lord Coke says, (1 Inst. 129. a.) That *Ligeantia est vinculum fidei, Ligeantia est Legis essentia.* And Mr. Selden declares, that without the Bond of *Homage* or *Fealty*, no Possession (though it pay Rent or other Satisfaction, upon any Contract either censual, Emphyteuticary or the like) can be a Feud. Seld. Title of Honor, fol. 273. And therefore the Book of Feuds saying (Lib. 2. Tit. 24.) that *sunt quedam feuda ita data, ut pro his fidelitas non sit præstanda*, must be understood *De juramento fidelitatis*, and not of Fealty in general, as appears from the same Book, Tit. 3, 76. and Crag. de jure feud. 47.

36 *An Introduction to the*

II. That a FEUD is always presumed to be a *proper* FEUD, unless it appears *ex verbis Investituræ* to be otherwise (w).

III That *improper* FEUDS are distinguished from *proper* FEUDS by such Qualities only, as are varied or superadded to the FEUD by express Provision of the Parties, and that they in all other Respects retain the Nature of an *original* FEUD (x).

IV. That in the Consideration of *improper* FEUDS, of which Sort most FEUDS are at this Day, not only the Terms contracted, but the Custom of

(w) *Illud semper mente tenendum quod semper præsumatur feudum proprium, nisi mutata esse ejus naturam ex verbis Investituræ constet. Crag. de jure feud. 52. Probari necesse est, Feuda esse non recta, cum in dubio feudum simplex & rectum esse præsumatur. Zasius in usus feud. 113. Stry. Exam. jur. feud. Cap. 3. Q. 6.*

(x) *Recepti juris est quod licet feuda in aliquibus contra naturam feudalem concedantur, in reliquis tamen vel Capitulis vel placitis, quæ non sunt alterata, Feudum in recta natura & simplici remanet. Zasius in usus feud. 113. — Eatenus tantum degenerantia dicuntur (Feuda) quatenus pacto immutantur, in reliquis feudi proprii naturam servant. Crag. de jur. feud. 48.*

the

Law of Tenures. 37

the Country, where the FEUD lies, is to be nicely observed (y).

V. That *Investiture*, that is to say, the Solemnity, by which the Vassal or feudal Tenant is inducted or admitted to a FEUD, is altogether as necessary to an *improper*, as to a *proper* FEUD (z).

Having gone thus far into the Nature and Learning of FEUDS, it may be expected from me before I close this Part of my Design, that I should consider the several Obligations arising between a feudal Lord and his Vassal or Tenant, in respect of this Policy, and of the feudal Relation between them: But as the feudal Writers are very co-

(y) *Mos Regionis non minus dat Legem feudo quam tenor.* Crag. de jure feud. 50. ——— *Dupliciter consideratur natura feudi, aliqua est, quæ ex scriptis constat usibus ——— Quædam quæ ex moribus, usuve cujusque Provinciæ observatis recepta est; Feuda enim quam maxime consuetudine constare sæpe diximus.* Zasius in usus feud. 123.

(z) *Sciendum est feudum sine Investitura nullo modo constitui posse.* Feud. Lib. 1. Tit. 25. Lib. 2. Tit. 1, 2. Vide Crag. de jure feud. Lib. 2. Dieg. 2. fol. 132.

38 *An Introduction to the*

pious upon this Head (a), and few of the feudal Obligations are, as such, of Force with us, I shall only take Notice of the Obligations relating to *Eviction* and *Aid*, and of those, meerly because our Laws of *Warranty* and *Aid* may be supposed to depend upon them.

I. The feudal Obligation upon *Eviction*, *ut vel Feudum aliud ejusdem bonitatis restituat Dominus vel æstimationem præstet* (b), if considered as a Penalty upon the Lord, for refusing or neglecting, when required (c), to protect or defend his Feudatary's Title to the FEUD or *Fee*, might be always reasonable: But it is much to be questioned, whether the Lord's Obligation to protect or defend his Feudatary, made him anciently liable

(a) Crag. de jure feud. Lib. 2. Dieg. 11. Hanneton, de jur. feud. Lib. 1. Cap. 11, 12. Stry. Exam. jur. feud. Cap. 18. Zasius in usus feud. Cap. 7.

(b) Vide Stry. Exam. jur. feud. Cap. 24. Q. 23. Feud, Lib. 2. Tit. 8. 25.

(c) Vide feud. Lib. 2. Tit. 25,

upon

Law of Tenures. 39

upon Eviction (without any Fraud or Defect in him) to compensate the Loss of the FEUD ; inasmuch as it can hardly be imagined that, while FEUDS were precarious and held at the Will of the Lord, or indeed that, while they were generously given without Price or stipulated Render, the Lord should be subject to such Loss (d); especially since it is not unlikely, that the Lord's Obligation upon Eviction, rather prevailed upon the Reason of *contracted* and *improper* FEUDS, than from the Nature of a *pure original* FEUD : It seeming as to them highly reasonable that, if a Price was paid, or an Equivalent of any Kind stipulated or contracted for, the Feudatary should have his Bargain, and that, if the FEUD was evicted as the FEUD or *Propriety* of another, the Lord

(d) *Varrantizationis quam dicimus, sive de evictione actionis vis omnis a dispositione pendet, nam si feudum ex titulo puræ donationis procedat, vix locus est varrantizationi, Iniquum enim videretur, qui ex sua Liberalitate quid concesserint, ut in id teneantur, quod non habent, si non tamen aliquid vel dolo, vel arte fecerint, quo minus feudum ad Vasallum transeat. Crag. de jur. feud. 152.*

D 4

should

40 *An Introduction to the*

should answer the Loss, and make the Party amends (e). And though none of the antient Feudists make any such Distinction; but all of them suppose the Lord's Obligation upon Eviction to have been general (f), yet they must be understood to speak of the Times in which they wrote, when *improper* FEUDS chiefly prevailed; nay, when almost all FEUDS were alienable and Saleable as Matters of Merchandise.

II. *Aid*, in the Sense wherein it is understood at this Day (in most Places where the feudal Law prevails)

(e) Vide Crag. *ibid.* & fol. 146.

(f) *Feudistæ tamen omnes Dominum feudi Vasallo de Evictione teneri volunt.* Crag. *ibid.* —

Generaliter verum est in Feudis, Dominos de Evictionibus teneri. Feud. Lib. 2. Tit. 80. But Glanvil makes the following Distinction, viz *Si aliquis alicui donaverit aliquod Tenementum pro servitio & Homagio suo, quod postea aliis versus eum dirationaverit, tenebitur quidem Dominus tenementum id ei warrantizare, vel competens Escambium ei reddere. Secus est tamen de eo, qui de alio tenet feodum suum sicut Hæreditatem suam, & unde fecerit Homagium, quia licet terram illam amittat; non tenebitur ei Dominus ad Escambium.* Glanvil. Lib. 9. Cap. 4. p. 70.

Law of Tenures. 41

to import an Obligation upon the feudal Tenant, to contribute to the private Necessities or Occasions of the Lord, was not of direct feudal Obligation (g); inasmuch as the original *feudal Aid* seems to have been purely military, binding the Feudatary merely to concur with, and to assist his Superior or Lord in Defence of the FEUD or *feudal Society* (h); and if the genuine *feudal Aid* was of this Nature only, it can hardly be made out, that the several different *Aids*, which have been exacted, and taken by feudal Lords, for many Ages, in most Parts of *Europe* (i), are to be inferred

(g) *Quæsitum est si Dominus in perjurium incidat, quia dare non valeat quod dare juraverat, & Vasallus eum liberare possit suam pecuniam dando & non faciat, an Beneficium amittat? Et Responsum est non amittere.* Feud. Lib. 2. Tit. 26. Sect. 5. — *Alere inopem Dominum aut eum Custodia seu Carcere Liberare, num Vasallus cogitur? non cogitur, nisi juvandi Vasalli causa Dominus bona sua consumpserit, vel nisi maximum sit Feudum, vel nisi de omnibus Vasallum investivit, verum id Utilius fuerit initio stipulari.* Ibid. Num. 27. in Marg. & Zasius in usus feud. fol. 42, 43. But the Text makes no such Exceptions or Distinctions.

(h) Vide supra, p. 6, — 10.

(i) Vide Du Fresne Gloss. ad verb. Auxilium. Constitut. Sicul. & Neapolitan. Lib. 3. Tit. 18, 19. Zasius in usus

42 *An Introduction to the*

ferred from the Reason of FEUDS, or that they do not altogether depend upon the Usage or Custom of the several Countries (k) where they are established; so that I shall not consider them here as direct feudal Consequences; but shall hereafter (l) consider them so far only, as they concern us.

Though these Notices relating to *Eviiction* and *Aid* may, with Regard to my present Design, suffice concerning the particular Obligations arising between a feudal Lord and his Vassal; yet it must be observed, that the feudal Obligations in general, how various soever they were,

usus Feud. 42, 43. Hanneken. de jure Feud. Lib. 1. Cap. 10. p. 111, 116. Stry. Exam. jur. Feud. Cap. 18. Q. 34. &c. Crag. de jure feud. 213. Mad. Hist. of the Exchequer 396, 397.

(k) Strykius, speaking of the Vassal's Contribution *ad dotandam filiam*, says that in *jure feudali hoc vix fundatum, sed ex consuetudine locorum id potius determinandum*. Stry. Exam. jur. feud. Cap. 18. Q. 38. And yet *Aids*, of all Kinds, may be understood, to fall within the Notion of *Faalty*, as it is explained in the Book of *Feuds*, viz. *Qui Domino suo fidelitatem jurat, ista sex in memoria semper habere debet, incolumis, tutum, honestum, utile, facile, possibile*. Feud. Lib. 2. Tit. 6.

(l) *Infra* p. 105.

were

were equally enforced and exacted from both: It following from the Nature, as well as the Design of the feudal Relation, that the Duties of such Relation, should on both Sides be punctually and effectually answered: Inasmuch, that if the Vassal on the one Hand refused to do his *Fealty* (m), or failed to perform the Services of the FEUD (n), or did by any Means attempt to defeat or weaken the Foundation of the Relation between him and his Lord, by denying (o),

(m) *Si Dominus a Vasallo petierit fidelitatem——nec legitime requisitus eam præstare voluerit, tanquam ingratus feudum amittit.* Feud. Lib. 2. Tit. 24, 100.

(n) *Non est alia justior causa beneficii auferendi quam si id propter quod Beneficium datum fuerit, hoc servitium facere recusaverit.* Feud. Lib. 2. Tit. 24. Zafius in usus feud. 83. Hanneton. de jure feud. Lib. 3. Cap. 10. p. 342. Crag. de jure feud. 365.

(o) *Vasallus si Feudum vel Feudi partem aut Feudi conditionem ex certa scientia inficiatur, & inde convictus fuerit, eo quod abnegavit Feudum ejusve conditionem, expoliabitur——Vasallus feudum quod sciens abnegavit, amittit.* Feud. Lib. 2. Tit. 26.——*Si Vasallus Domino super Feudo vel ejus conditione conventus, feudum sciens negaverit: Quia forte Feudum quod novum erat dicebat esse antiquum, vel rectum quod erat non rectum: Vel omnino rem feudalem esse negabat, tunc mendacii convictus feudo privabitur.* Zafius in usus feud. 90. Crag. de jure feud. 356. Hanneton. de jure feud. 338, 339. Feud. Lib. 2. Tit. 24. Sect. 3.

44 *An Introduction to the*

aliening (p), dismembering or impairing (q) the FEUD ; or in Truth, if he did any thing against his Fealty in general (r), to the Prejudice of his Lord, the Lord might resume the FEUD (f). The Lord again on the other Hand was bound *pari pœna* to observe and comply with the Terms of Relation on his Part ; insomuch that if he neglected to protect or defend his Feudatary, or did any Thing that was prejudicial to him, or injurious to the feudal Relation, he lost his *Seignior*y (t) or Interest in the FEUD ; and thus the

(p) Vide supra p. 29. Zasius in usus feud. 79. Stry. Exam. jur. feud. Cap. 23. Q. 19.

(q) *Si Vassallus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur.* Zasius in usus feud. 91. Crag. de jure feud. 362.

(r) *Si contra ea quæ in fidelitate nominantur, fecerit (Vassallus) Beneficio carebit.* Feud. Lib. 2. Tit. 97. Vide Feud. Lib. 2. Tit. 24. Sect. 2. & Lib. 5. Tit. 2. Zasius in usus feud. 83, 90, 93. Hanneton. de jure feud. Lib. 3. Cap. 11, 12. Crag. de jure feud. Lib. 3. Dieg. 5, 6. Stry. Exam. jur. feud. Cap. 23.

(f) Vide Feud. Lib. 2. Tit. 24. ad fin. & Tit. 98.

(t) *Ex omni Felonia (Ex omni offensa.* Zasius in usus feud. 96. *sive delicto.* Crag. de jure feud. 374. *Ex iisdem causis, quibus.* Stry. Exam. jur. feud. Cap. 23. Q. 50.) *qua Vassallus feudo privatur, & Dominus proprietate (directo suo Dominio.* Zasius & Crag. *ibid.) privetur.* Feud. Lib. 2. Tit. 47. & *ibid.* Tit. 26. Sect. 5. Note ;

Law of Tenures. 45

the Duties and Advantages of their Relation, which were reciprocal and equal, were duly inforced at the Peril of their several Interests.

Note, That Felonia vel Fallonia (quasi a fallendo. Stry. Exam. jur. feud. Cap. 23. Q. 2. Du Fresne Gloss. ad verb. Felonia.) Est culpa seu injuria (delictum vel perfidia. Zasius in usus feud. fol. 8. Stry. ibid. Q. 1.) propter quam vassallus amittit feudum. Spelm Gloss. ad verba Felonia & Fallonia.

46 *An Introduction to the*

C H A P. II.

IT is difficult to determine precisely the Time, when FEUDS or *Tenures* were first brought into *England*; some have thought that they were planted here long before the *Conquest*, others that they were introduced by *William I.* soon after; the Authorities on both Sides of this Question are numerous, and therefore, though as mere Authorities, they can have little Weight; yet I shall mention the principal Persons who have differed on this Point, that the Reader may see, that bare Authority ought to have little or no Influence on his Judgment of this Question, and that he may in this Case, without Vanity or Danger of Censure, lean unto his own Understanding.

The

Law of Tenures. 47

The Lord Coke, (a), the Judges of Ireland in the Case of Tenures (b), Mr. Selden (c), Nathaniel Ba-

con

(a) The Lord Coke says, that the Tenure by Knight-Service—is of great Antiquity——And that it drew to it *Ward, Marriage and Relief*, in the Time of King Alfred. (1 Inst. 76. b.) And in the Preface to his 3 Rep. He supposes that the *Redditiones Socharum & Regis Servitium*, said in the Book of Domesday, a *Constitutione antiquorum Temporum*, to belong to the Church of Worcester, within the Hundred of Oswaldstow, prove Socage Tenure, and Knight-Service, long before the Conquest.

(b) They suppose that the *Thani Majores*, or *Thani Regis* among the Saxons, were the King's immediate Tenants of Lands, which they held by personal Service, as of the King's Person by *Grand Serjeanty*, or *Knight-Service in Capite*; and that the Land so held, was in those Times called *Thaneland*, as Land holden in Socage was called *Reveland*——And that after some Years that followed the Coming of the Normans, the Title of *Thane* grew out of Use, and that of *Baron* and *Barony* succeeded for *Thane*, and *Thainland*——They therefore concluding Sir Hen. Spelman mistaken, who in his Glossary, *Verbo Feudum*, refers the Original of Feuds in England to the Norman Conquest, say, that it is most manifest, that *Capite Tenures*, *Tenures by Knight-Service*, *Tenures in Socage*, &c. were frequent in the Times of the Saxons, but that indeed the Possessions of *Bishops* and *Abbots*, were first made subject to Knight-Service in *Capite* by William the Conqueror, in the fourth Year of his Reign, &c. See the Case of Tenures upon the Commission of defective Titles, &c. 8°. printed at London 1720. or the Substance of the Case as to this Point, in Bishop Gibson's Preface to Spelman's Treatise of Feuds, &c.

(c) This Dignity, says Mr. Selden, speaking of the Dignity of an *Earl*, was in some Places in England both
feudal

48 *An Introduction to the*

con (d), and others (e), are of Opinion

feudal and inheritable, even from the Age of the first Coming of the Saxons into England, which is commonly placed in 448, of our Saviour, though by exacter Calculation it falls twenty Years sooner——And that *Ethelred*, *Ealdorman* of *Mercland*, had all that which was the Kingdom of *Mercland* to his own Use, as an *Earldom* and *Fief* given him in Marriage with *Ethelfleda*, by her Father King *Alfred*, and to prove this, cites *William* of *Malmesbury* *de Gest. Regum. Lib. 2. Cap. 4. Londonium caput Regni Merciorum cuidam Primario Ethelredo in Fidelitatem suam cum Filia Ethelfleda concessit. Vide Seld. Tit. of Hon. 510, 511. He says indeed, (ibid.) that Asserius and Florentius have it Servandum commendavit: And if he had gone on, he would have found that Will. of Malmesbury himself, in the very next Line, calls it Commissum, and afterwards Cap. 5. Commendatum, which Words rather suggest a Trust than a Feud. Vide Malmf. de Gest. Regum inter Scriptores post Bedam, fol. 44, 46. and Spelm. Posthum. Treat of Feuds 13.*

Mr. Selden likewise supposes the Names of *Thane* and *Vavasor* in the Saxon Times to have been *feudal*, and that as *Earl*, *King's Thane*, and *middle Thane* succeeded one the other in the Saxon Laws, so *Count*, *Baron*, and *Vavasor* are used as Interpreters of them in the French Laws of *William I.* and that the *King's Thanes* held of the King in chief by *Knight-Service*, and were of the same Kind with them, that were after the *Normans* *Honorary* or *Parliamentary Barons* (*Tit. of Hon. 513.*) and he says (*ibid. 520.*) that a *Vavasor* was in the most antient Times only a Tenant by *Knight-Service*: that either held of a mesne Lord, and not immediately of the King; or at least of the King as of an *Honour* or *Manor*, and not in *Chief*.

(d) Who thinks that it is not clear from any Author of Credit, that the *Normans* changed the Tenures of Lands——And that none of them appeared to him to be of *Norman* Original, altho' they received their Names according to that Dialect. *Bacon. Hist. of the Eng. Gov. 161.*

(e) *Saltern* supposes Conveyances by *Feoffment* and *Livery* to have been before the Conquest and that there

Law of Tenures. 49

nion, that *Tenures* were not brought into *England* by the *Conqueror*, but that they were common among the *Saxons*.

The Lord *Hale* (g), *Crag* (h),
E Mr.

there were *Lords* and *Tenants* in the Days of *Gorbonian* the Good, and that *Fealty* was sworn to the Prince in the Time of *Elidurus*, which of Necessity (says he) were accompanied with *Tenures*, *Services*, *Distresses*, and the Like. *Vide Saltern de antiquis Britan. Legibus Cap. 8.*

Sir *William Temple* says, that those Authors, who will make the *Conqueror* to have broken or changed the *Laws of England*, and introduced those of *Normandy*, pretend the Duty of *Escuage*, with the *Tenures* of *Knight-Service* and *Baronage*, came over in this Reign; but that it needs no Proof, that those, with the other feudal *Laws*, were all brought into *Europe* by the ancient *Goths*, and by them settled in all the *Provinces* (which they conquered) of the *Roman Empire*, and among the Rest by the *Saxons* in *England*, as well as by the *Franks* in *Gaul*, and the *Normans* in *Normandy*. *Temp. Introd. to the Hist. of Eng. 171, 172.* And the Author of the *Mirror* seems to imagine, that *Tenures* were ordained for the Defence of the Realm by our old Kings before the *Conquest*. *Vide Mir. Cap. 1. Sect. 3. p. 11, 12.*

(g) The Lord *Hale* mentions the Law touching *Knight Service*, as one of the *Laws of William I.*, which were designed for the establishment of him in the Throne, and for the securing the Peace of the Kingdom (*Hist. of the Com. Law 107*) and he endeavours to shew (*ibid. 223, 224.*) That *Tenures* by *Knight Service*, were introduced in the Time of *William I.* with the Consent of *Parliament*.

(h) *Anglos ante Conquestum vix puto, (says Crag,) hęc Jus (scilicet Feudorum) recepisse, rationes cur ita credam hæc sunt — Scio ante Conquestum multas apud Anglos Leges ab Anglo-Saxonum Regibus ante conquestum*

50 *An Introduction to the*

Mr. Somner (i) Sir Henry Spelman (k)
and

stum conscriptas——Ne vestigium quidem Juris feudalis in eis pæne reperitur, nam licet vasallorum in Dominos Ingratitudo, sive Felonia expresse aliquo statuto puniatur, Pæna tamen non est Amissio Feudi, ut in Jure Feudali, sed tantum vel mulcta pecuniaria si parva sit Injuria, vel pæna Capitis si Major, quæ Juris feudalis Naturam non sapiunt——Præterea ex ipso Polydoro, qui Anglorum Historiam conscripsit diligentissime, constat manifeste Conquestorem, cum omnia Angliæ prædia jure Belli ad se pertinere diceret, legem Agrariam tulisse, qua se omnium Possessionum Dominum declaravit (Quod nihil aliud erat quam omnia prædia de eo tanquam Domino teneri, &c.) Vid. Crag. de jur. feud. 29,

(i) Before the Conquest, says Mr. Somner, we were not in this Kingdom acquainted with what since, and to this Day, we call *Feoda*, Foreigners *Feuda*, i. e. *Fiefs* or *Fees*, either in that general Sense I mean, wherein they are discoursed of, and handled abroad in the Book thence intitled *De Feudis*, at Home in that called *Littleton's Tenures*. (*Treat. of Gav. 100.*) He proves this Assertion, (*ibid. 100, 104.*) and concludes, that to the Conqueror it is, that the Names and Customs of our *English Fees*, or (as we now vulgarly call them) *Tenures*, such at least as are Military, owe their Introduction.

(k) *Jus Feodale* (says Sir H. Spelman) *Anglis primus imposuit Gulielmus Conquestor*, (*Gloss. ad Mag. Chart. fol. 374.*) and again, (*ad verbum Feodum*) *Feodorum servitutes in Britanniam nostram primus invexit Gulielmus Senior Conquestor nuncupatus, Qui lege ea e Normannia introducta Angliam totam suis divisit Commilitibus: Innuit hoc ipsum Codex ejus Agrarius——(Qui) Feodum & Normanniam jungit, ac si rei novæ Notitia e Normannia disquirenda esset——* And it being said by the Judges of Ireland, in the above-mentioned Case of Tenures, that Sir H. Spelman, thus referring the Original of Feuds in England to the Norman Conquest, was mistaken; He wrote an elaborate Treatise of the Nature and Original of Feuds and Tenures in Support and Confirmation of his Opinion. This Treatise is published by

Law of Tenures. 51

and others again (1), are of Opinion that FEUDS were brought hither by the Conqueror, and that they were in his Time first established among us.

It would be tedious and hardly pertinent to my present Design, digged by Bishop Gibson 1723, among the Posthumous Works of this Great Man.

(1) *Mat. Paris*, (*Anno* 1068. fol. 6.) says, that *Will. I. Commilitonibus suis, qui Bello Hastingsi Regionem secum subjugaverant, terras Anglorum & Possessiones affluentiori Manu contulit, illudque parum quod remanserat sub Jugo posuit perpetuæ servitutis*. And again, (*anno* 1070. fol. 7.) he says, that this King *Episcopatus quoq; & Abbantias omnes quæ Baronias tenebant, & eatenus ab omni servitute seculari Libertatem habuerant, sub servitute statuit Militari, irrotulans singulos Episcopatus & Abbantias pro voluntate sua quot Milites sibi & successoribus suis Hostilitatis Tempore voluit a singulis Exhiberi: Et Rotulos hujus Ecclesiasticæ servitutis ponens in The-sauris, multos viros Ecclesiasticos huic Constitutioni pessimæ reluctantes a Regno fugavit*.

Mr. Camden asserts, that the English were dispossessed of their Hereditary Estates by William I. and the Lands and Farms divided among his Soldiers, but with this Reserve, that he should still remain the direct Proprietor, and oblige them to do Homage to him and his Successors, that is, (says he) that they should hold them in Fee, but the King alone Chief Lord, and they feudatory Lords, and in actual Possession.

Dr. Hody says, that Baronies and such Tenures were first brought into England by the Conqueror, (*Hist. of Convoc.* 117.) and Bracton, speaking of the Regale Servitium, intimates as much in these Words, *Secundum quod in Conquestu fuit adinventum*. Bract. Lib. 2. Cap. 16. Sect. 7. Vid. Dugd. Orig. Jurid. 6. Wilkins Leg. Anglo-Saxon. fo. 288, 289. Cottoni Posthuma, 13, 14, 346.

52 *An Introduction to the*

stinctly to examine and consider the Ground of these Opinions; and therefore I must refer the Reader to the Treatises in which they are advanced, and leave him upon due Consideration to judge of them as he pleases: Taking only this Observation along with them, that it is very remarkable, That *William I.* about the twentieth Year of his Reign, just when the Genenal Survey of *England*, called *Domesday-Book*, is supposed to have been finished (m), and not till then, summoned all the Great Men and Landholders in the Kingdom to

(m) *Ante Annum Gulielmi vicesimum, Descriptio hæc non est absoluta, immo in eo facta; Testis est omni exceptione longe Major voluminum eorum in quæ referebatur, Alterum & Minus quo seorsim censitæ sunt Essexia, Norfolkia, & Suffolcia, In hujus calce Literis Majusculis, nec ipsa Descriptione recentioribus, adjectum est.*

ANNO MILLESIMO OCTOGESIMO SEXTO AB INCARNATIONE DOMINI, VIGESIMO VERO REGIS WILLIELMI, FACTA EST ISTA DESCRIPTIO, NON SOLUM PER HOSTRES COMITATUS SED ETIAM PER ALIOS. Seld. præf. ad Eadmer. fol. 5.—The Lord *Hale* and Mr. *Madox*, agree with Mr *Selden's* Account of this Matter, and *Tho. Wikes*, and *Walter Hemingsford* in their *Chronicles* (published by *Gale*,) fix this Survey accordingly, ad an. 1086. Vid. *Hale Hist. of the Com. Law.* 109. *Mad. Hist. of the Excheq.* fol. 6. in Marg.

London

Law of Tenures. 53

London and Salisbury (n), to do their
Homage, and swear their Fealty to
E 3 him,

(n) *Ingulphus* who lived at that Time says, *ad an.* 1085. that the King *reversus in Angliam apud Londonias Hominium sibi facere & contra omnes Homines Fidelitatem jurare omnem Angliæ incolam imperans totam Terram descripsit.* *Ingul. Int. Script. post Bedam, 908.*

Henry of Huntingdon, (*ibid. fol. 370.*) says that *Willielmus Rex fortis, Anno Decimo nono Regni sui, cum de more tenuisset Curiam suam in Natali apud Gloucestre, ad Pascha apud Wincestre, ad Pentecosten apud Londoniam, Henricum filium suum virilibus induit Armis. Deinde Accipiens Hominium omnium terrariorum Angliæ cujuscunque Feudi essent, Juramentum etiam Fidelitatis non distulit.*—*Brumton (int. Script. X. fol. 979.)* agrees with this Account of Huntingdon, but fixes it, *ad annum vicesimum Regis*, and supposes the Survey of England to have been made in the Year before.

The *Waverly Annals*, *Mat. Paris* and *Mat. Westm.* agree almost in terminis with *Hen. of Huntingdon*, but fix this Homage *ad An. 1084*—The *Saxon Chronicler* says, *ad An. 1085. Hoc Anno Rex tenuit suam Curiam in Wincestre ad Pascha, atq; ita Itinera instituit, ut esset ad Pentecosten apud Westminster, ubi Armis militaribus honoravit filium suum Henricum. Postea sic Itinera disposuit, ut Pervenerit in Festo Primitiarum ad Searebyrig, ubi ei Obviam venerunt ejus Proceres & omnes prædia tenentes, quotquot essent notæ melioris, per totam Angliam hujus Viri servi fuerunt, omnesque se illi subdidere, ejusque facti sunt Vassalli, ac ei Fidelitatis Juramenta præstiterunt, se contra alios quoscunque illi fidos futuros.* *Hoveden (Int. Script. post Bedam, 460.)* *Ad An. 1086.* says that *Willielmus Rex fecit describi omnem Angliam*—*Post hæc in Hebdomada Pentecostes filium suum Henricum apud Westmonasterium, ubi Curiam suam tenuit, Armis Militaribus honoravit, nec multo post Mandavit ut Archiepiscopi, Episcopi, &c. Calendis Augusti sibi occurrerent Sarisbirie, quo cum venissent Milites illorum*

54 *An Introduction to the*

him, by doing whereof the *Saxon Chronicler* supposes that, at that Time, *Proceres & omnes prædia tenentes se illi subdidere, ejusque facti sunt Vasalli*, so that we may reasonably suppose,

First, That this general *Homage* and *Fealty* was done at this Time (nineteen or twenty Years after the Accession of *William I.*) in Consequence of something new, or else that Engagements so important to the Maintenance and Security of a new Esta-

illorum sibi Fidelitatem Jurare coegit. ——— Simeon Dunelm. (Int. Scrip. X. 213) agrees in terminis with Hoveden. And the Waverly Annals again, ad An. 1086. say that An. Reg. Will'i Vicefimo Rex tenuit Curiam suam apud Wintoniam, postea ad Kalendas Augusti fuit apud Salisburiam, ibique venerunt coram eo Barones sui & omnes terrarii hujus Regni, qui alicujus pretii erant, cujuscunque Feodi fuissent, & omnes Homines sui effecti sunt, & Juraverunt illi Fidelitatem Contra Omnes Homines.

It must be observed, that tho' some of these Historians mention only the Homage done at *London*, others that at *Salisbury* only, and none but the *Waverly Annals* expressly mention both; yet we may upon the Credit of these *Annals* suppose, that these Historians speak of two *several Homages* done about the same Time, soon after the King's Knighting his Son *Henry*: Besides that it is highly probable that the King received the *Homage* of some at *London*, and of others at *Salisbury*; It being very unlikely that the Landholders who lived in or about *London*, where the King often was, should come to *Salisbury* to do their *Homage*.

blishment

Law of Tenures. 55

blishment would have been required long before; and if so, it is probable that *Tenures* were then new, inas-much as *Homage* and *Fealty* were, and still are, meer feudal Engagements, binding the *Homager* to all the Du-ties and Observances of a *Feudal* Te-nant (o).

E 4

2dly,

(o) It appears not only from the several Historians cited in the former Note; but likewise from the Mirror 226, 227. Britton 174. b. *Bract. Lib. 2. Cap. 35. Sect. 8, 9.* and *Fleta, Lib. 3. Cap. 16. Sect. 21.* That *Homage* and *Fealty* (though treated by the Feudists as Synonymies) were really with us distinct, though concomitant Engagements; for though *Fealty* was incident and essential to *Homage* or *Tenure*, (1 *Inst. 65. & supra p. 35.*) and is now become Part of the Form of *Homage* itself; (*vid. Stat. de Homagio, 17 Edw. 2. and Lit. Sect. 85.*) yet there was, no doubt, antiently a considerable Difference between them; inasmuch as *Homage* was meerly a Declaration of the *Homager's* Consent to become his Lord's Man, or military Tenant of such Lands or Tene-ments. (*Jeo deveigne vostre home de tiel fief. Mirror p. 206.* and the same Author, p. 304. reckons it one of the A-buses of the Common Law, *de mettre plus des paroles en Homages faire forsque tant, jeo deveigne vostre home del fiew que jeo claime tenir de vous.*) *Homagium & Domini-um* are therefore directly opposed to each other by *Glan-vil, viz. Mutua——debet esse Domini & Homagii fidelitatis Connexio, Ita quod Quantum Homo debet Do-mino ex Homagio, (i. e. by consenting to become his Tenant, or on Account of his Tenure) tantum illi de-bet Dominus ex Dominio, (i. e. by becoming his Lord, or on Account of his Seignior) præter solam reverenti-am.* Vid. *Glanv. Lib. 9. Cap. 4. Fealty* on the other Hand

56 *An Introduction to the*

2dly, That as this general *Homage* and *Fealty* was done about the Time that *Domesday-Book* was finished, and not before, we may suppose, that that Survey (p) was taken upon, or soon after, our Ancestors Consent to *Tenures*, in order to discover the Quantity of every Man's *Fee*, and to fix his *Homage* (q); this Supposition is the more probable, because it is not likely, that a Work of this Nature was undertaken without some imme-

Hand was a solemn Oath, consequential to *Homage*, and sworn immediately after it, that the Homager would, as his Man or Tenant; be *faithful* to his Lord.

(p) The Nature of this Survey may be collected from *Spelm. Gloss. ad verbum Domesdei. Seld. præf. ad Eadmerum*, 3, 4. *Gerv. de Tilb. Dial. de scacc. Lib. 1. Cap. 16. Ingul. Hist. int. script. post Bedam*, 908, 909.

(q) Because anciently the Name and Quantity of the *Fee*, &c. was specified in the *Homage*, as appears from the *Mirror*, *Cap. 3. Sect. 36. d'Homage*, where it is said, that *Homage est fait en cestés parolls, Jeo deveigne vostre home de tiel fief, issintque tout l'quantity soit monstre & Especifié en certain* (or as *Britten 174.* says, *nomement par certeyne quantite & par certeyns boundes*) *par Quoy l'su'r sache combien & quoy il doit garranter a son Tenant; & de combien il oblige son Fief a la Garantie & que le tenant sache d'combien il devient son home.* And this probably was the Reason why almost all the Historians of those Times join the Account of this Survey, and of the *Homage* done about that Time, together in such a Manner, that we must needs think they took them to have immediate Relation one to the other.

diate

Law of Tenures. 57

diate Reason, and no better Reason can be assigned why it was undertaken at this Time, or indeed why this Survey should have been taken at all (r),

Taking it therefore at present for granted, that Fees or Tenures were first established in *England* in the Time of *William I.* (f), I shall now pro-

(r) For *Alfred* had taken a general Survey of the whole Kingdom, which was ingrossed and kept at *Winchester*, and extant in this King's Time, (See *Sir Jo. Spelman's Life of Ælfred*, published by *Hearne*, p. 108, 115.) but this Survey seems to have been too general to answer the Purposes of this Reign, and therefore a more particular Survey was taken. This Difference between the two Surveys is (without his assigning any particular Reason for it,) observed by *Ingulphus*, who says that *Alfredus* ——— *totam terram Angliæ per Comitatus, Centurias & Decurias descripserat*: But that in *Domesday-Book*, *non tantum totius terræ Comitatus, Centuriæ & Decuriæ, Sylvæ, Saltus & Villæ universæ, sed in omni Territorio, Quot Carucatæ terræ, quot Jugera & quot acræ, quæ Pascua & Paludes, quæ Tenementa & qui Tenentes continebantur.* *Ingul. int. Script. post Bedam* 908.

(f) i. e. That they in his Time first became a principal Branch of the national Policy, for it is not to be imagined, but that even in the *Saxon* Times, particular Proprietors of large Tracts of Land, which they could not cultivate and manure themselves, might let some Part of them to their Neighbours, under various Acknowledgements, or Returns of Service, not altogether unlike some of the feudal Returns. Especially as our
Saxon

58 *An Introduction to the*

proceed to inquire and consider the Means by which so extraordinary an Alteration of the national Policy, with respect to *Propriety*, was brought about. In which Inquiry many Things will occur that may possibly convince us, that this Alteration was made in the Time of this King.

I call the Establishment of Tenures an extraordinary Alteration, not only because it was such in many of its Consequences, but likewise because it originally and immediately defeated all Supposition or Possibility of Propriety in any other Person than the King. Insomuch that it became a fundamental necessary Maxim, Principle or Fiction of our *English* Law of *Tenures*, that the King is universal Lord of his whole Territories, and that no Man doth, or can possess any Part thereof, or Lands there-

Saxon Ancestors may be supposed to have had some Notion of such Returns; they being a Colony or Branch of the ancient *Goths*, who first brought the *Feudal Policy* into *Europe*——Upon this Supposition the wide Difference of Opinions, concerning the Antiquity of Feuds in *England*, may be in some Measure accounted for.

in

Law of Tenures. 59

in, but as either mediately, or immediately derived from him (t).

This Principle or Fiction, howsoever understood by Persons of Capacity, and in the Councils of this King, appeared no doubt to others rather as the Language and Declaration of a Conqueror, than as the *Substratum* and Foundation of a new Policy not imposed, but nationally and freely adopted (u): And it is certain that this Principle or Fiction of *Tenures* hath been of late so far mistaken, that very learned Men, not considering it as a Fiction, have thought that the first Kings of this Realm had all the Lands of *England* in Demesne, and that all private Possession was actually derived from them (w): But in this they seem to have too implicitly followed the *Monkish* Historians, who (being prejudiced or misled possibly by the large Possessions of a

(t) *Ex Ratione Feudali omnia Feuda & Beneficia ab eo (Domino scil't ligio) proficiscuntur & de eo tenentur.* Crag. De Jur. Feud. 223. Vide Spelman Treat. of Parliaments 57. & infr. p. 137.

(u) Vid. inf. p. 64—73.

(w) Vid. 1 Inf. 58. b. Spelm. Treat. of Parliaments 57, 58. and Lord Verulam of the Use of the Law 34. sud-

60 *An Introduction to the*

sudden acquired by the *Normans* to the Prejudice of the *English*) have roundly affirmed that *William I.* violently dispossessed the *English* of all their Lands, and that he disposed of them upon arbitrary Terms of Tenure to such of his Followers, and in such Proportions as he thought fit (x); for, notwithstanding the many *Monkish* Relations of this Sort, credited by later Writers of Learning and Note (y), we may

(x) *Mat. Westminster* (Lib. 2. fol. 1.) says that *Commilitonibus suis Normannis qui in bello Hastingenſi patriam ſecum ſubjugaverant, terras Anglorum & poſſeſſiones, iſſis expulſis ſucceſſive, manu diſtribuit affluentibus, & modicum illud quod remanſerat, factus jam de Rege Tyrannus, ſub jugo detrufit perpetuæ ſervitutis*——*Mat. Paris* (ad An. 1067. fol. 5.) aſſerts the ſame Thing in *Terminis*——*Bromton* (int. Script. X. 963.) ſays that *Rex Willielmus terras Anglorum Magnatibus & Militibus, ac aliis hominibus Franciæ & Normanniæ qui ſecum in Conqueſtu ſuo extiterant donavit*——*Thorn* likewise (int. Script. X. 1787.) ſays ad An. 1067. that *Willielmus de Rege factus eſt Tyrannus, Expulſiſque Regni Nobilibus, Episcopis, Comitibus, Abbatibus & Clericis multis, quos longum eſſet Nominatim Exprimere, eorum Poſſeſſiones & prædia diatim ſuis diſtribuebat Normannis.*

(y) Sir *H. Spelman* upon the Authority of theſe *Monkish* Writers, (*Gloſſ. Verbo Feodum*) ſays that *Lege ea (feudorum ſcil't) E Normannia tradueta, Angliam totam ſuis diſviſit Commilitibus*——And thus *Selden* (a *Cambden in Norm. Epin. 13.*) ſays that *Excluſis, ab Hæreditate quita Anglis, Agros & prædia militibus ſuis Aſſignavit, Ita tamen ut Dominium directum ſibi reſervaret, obſequi-*

Law of Tenures. 61

may, upon due Inquiry and Consideration, be satisfied, that *William I.* did neither possess himself, nor as a Conqueror dispose of all, or any of the Lands of *England*: Nor did he arbitrarily, and by his own Power subject the Estates of the *English* to a feudal Dependence; for,

I. Tho' it is true that the Possessions of the *Normans* were of a sudden very Great, and that they received most of them from the Hands of *William I.* yet it does not follow, that this King took all the Lands of *England* out of the Hands of their several Owners, claiming them as the Spoils of War, or as Parcel of a conquered Country; but on the contrary it appears pretty plain from the History of those Times, that the King either had, or pretended Title to the

quicumque clientelari Jure sibi & successoribus devinciret, i. e. ut omnes in Feodo sive Fide teneant, & nulli præter Regem essent veri Domini, sed potius fiduciarii Domini & Possessores. And the Lord *Verulam* asserts, that the Conqueror got by Right of Conquest all the Land of the Realm into his own Hands in Demesne, taking from every Man all Estate, Tenure, Property and Liberty of the same, except Religious and Church Lands, and the Land in *Kent*. *Verul. of the Use of the Law* 34, 35.

Crown

62 *An Introduction to the*

Crown, and that his Title, whether real or pretended, was established by the Defeat of *Harold*, which amounted to an unquestionable Judgment in his Favour. He did not therefore treat his Opposers as Enemies, but as Traitors (z), agreeably to the known Laws of the Kingdom, which subjected Traitors not only to Loss of Life, but of all their Possessions (a); so that this King, thus intitling himself to the Lands of all such as had, or did afterwards oppose him, might well reward his Followers in the Manner he did, and that this must have been the Case appears from the Nature of the Pleas held and determined at *Pinenden* (b), and *Sharnburn* (c), and by many other Evidences of the Time of this

(z) Vid. Bacon, Hist. of the Eng. Gov. 135.

(a) Vid. Leg. Alfredi Cap. 4. Leg. Canuti Cap. 54. Saltern de Antiquis Britan. Legibus Cap. 10.

(b) This Plea is printed at large in Mr. Selden's Notes ad Eadmerum 197, 200. Vid. Lamb. Peramb. 236, 237. Hale Hist. of the Com. Law 96.

(c) This is to be found at large in Sir H. Spelman's Posthum. Treat. de Familia de Sharnburn, fol. 190. Vid. Wilkins Leg. Anglo-Sax. 287. Hale Hist. of the Com. Law 99. Spelm. Gloss. ad verb. Drenches. Bacon Hist. of the Eng. Gov. 158. and Taylor Hist. of Gav. 65, 66.

King

King, and of his immediate Successors (d).

II. As *William* I. did not claim, or possess himself of the Lands of *England* as the Spoils of Conquest, so neither did he tyrannically and arbitrarily subject them to a feudal Dependence; but as the Feudal Law was at that Time the prevailing Law in *Europe* (e), and “was then, says “*Sir Henry Spelman* (f), conceived “to be the most absolute Law for “supporting the Royal Estate, preserving Union, confirming Peace, “and suppressing Incendiaries and “Rebellions”, *William* I. who had always governed by this Policy, might probably recommend it to our Ancestors, as the most obvious and ready Way to put them upon a Foot with their Neighbours, and to secure the Nation against any future Attempts

(d) Vid. *Tayl. Hist. of Gav.* 67, 68. *Madox Hist. of the Excheq.* 75, 76. *Wilkins Leg. Anglo-Sax.* 236.

(e) *Sir Hen. Spelman (Posthum. Treatise of Parliaments* 57) calls it the Law of Nations, for so, says he, I may term the Feudal Law then to be in our Western Orb.

(f) *Posthum. Treat. of Feuds* 5, 6.

(g) *Plu-*

64 *An Introduction to the*

tempts from them (g), and might probably propose Laws agreeable thereto, as such *quæ ad Utilitatem Anglorum, & ad Regni Pacem tuendam Efficacissimæ videbantur*; (h) and it can be no Wonder that such of our Ancestors, as then composed the *Ccmmune Concilium* of the Nation, under the Sense they then were of the Strength and Progress of this Policy, should consent to its Establishment, and readily concur in a Law effectually penned for that Purpose: We find accordingly, among the Laws of *William I.* a Law enacting the Feudal Law itself, not *eo Nomine*, but in Effect; inasmuch as it requires from all Persons the same Engagements to, and introduces the same Dependence upon

(g) *Plusurs manners d'fees & de tenur sont dount tous l's plus sont De Chivalry & d'grand Serjaunty l's quex fees fuerent perveus al d'fes d'nost. Realme. Britton Cap. 66. p. 162. b.* And the Lord Coke says, (1 Inf. 75. b.) that this Service (*Servitium scil't militare*) was created and provided for the Defence of the Realm.

(h) *Propositis Legibus Anglicanis secundum tripartitam earum Distinctionem, hoc est, Marchenelage, Dene-lage, Westsaxenelage, quasdam reprobavit, quasdam autem approbans, illis transmarinas Neustriæ Leges, Quæ*
(ad

upon the King as *Supreme Lord* of all the Lands in *England*, as were supposed to be due to a *Supreme Lord* by the *Feudal Law*: So that it clearly enacts the Foundation at least of all the Deductions and Glosses, that are now treated as Part of that Law. The Law I mean is the LII. Law of *William I.* (i), which runs thus (k)

STATUIMUS UT OMNES LIBERI HOMINES FOEDERE ET SACRAMENTO AFFIRMARE (ad utilitatem Anglorum LL. Will. 1. Cap. 63. &) ad Regni Pacem tuendam, Efficacissimæ videbantur, adjecit. Gervaf. de Tilb. Dial. de Scacc. Cap. 16.

(i) It must be observed concerning this Law, that though the Substance of it is to be found in the Collection of *Edward the Confessor's Laws*; (*Cap. 35. Tit. Greve,*) yet considering the Subject Matter of the Law itself, and how much that Collection is suspected; (*Vid. Somn. Treat. of Gav. 101. Seld. Hist. of Tithes 224, 225. and Brady Gen. Pref. to the Hist. of England, 30.*) it is most likely that this is an original Law of *William I.* and that the Collection we now have of the Confessor's Laws which was drawn up at the Importunity of the People, (*See the Pref. to these Laws, Lamb. de Priscis Angl. LL. 138 and Wilk. Leg. Anglofax. 197.*) in the Time of *William I.* might receive some of the Alterations and Additions that were made in his Time.——The Reader will judge whether this Conjecture hath not some Countenance from the LIII. Law of *William I.* which Commands that all Persons should have and observe the Laws of King *Edward*, in omnibus rebus, ADAUCTIS HIIS quas constituimus ad utilitatem Anglorum.

(k) In Mr. Selden's Notes ad Eadmerum fol. 190. and Lamb. de Priscis Ang. Leg. 170.

66 *An Introduction to the*

FIRMENT (l), QUOD INTRA ET EXTRA
UNIVERSUM REGNUM ANGLIÆ (Quod
OLIM VOCABATUR REGNUM BRITAN-
NIÆ (m), WILLIELMO SUO DOMINO (n)
FIDELES ESSE VOLUNT, TERRAS ET
HONORES (o) ILLIUS FIDELITATE UBI-
QUE (p) SERVARE CUM EO; ET CONTRA
INIMICOS ET ALIENIGENAS DEFEN-
DERE (q).

The Terms of this Law are abso-
lutely Feudal, and are apt and proper
to establish that Policy with all its Con-
sequences; for First, It requires that all
Owners of Land (r) should expressly en-

(l) Statuimus ut omnis Liber Homo fide & sacramen-
to affirmet. *Hoveden, Int. script. post Bedam 600.*

(m) Quod intra & extra Angliam. *Ibid.*

(n) Willielmo Domino Regi suo *ibid.*——Willielmo
Regi Domino suo. *Wilkins Leg. Anglosax. 228.*

(o) Honorem. *Hoveden. Ibid.*

(p) Omni fidelitate sua. *Ibid.*

(q) Et contra inimicos defendere. *Ibid.*

(r) I have thus translated the Words *Liberi Homines*,
because this Sense agrees best with the Tenor of the
Law: And because it is probable that at that Time no
other Persons were so called, than those who are fre-
quently in *Domesday-Book* called *Aloarii* and *Alodiarii*,
and had *terram propriam*, Land wherein no other Man
had any Interest by Feodal Superiority or Dominion,
(*Vid. Spelm. Treat. of Feuds 18.*) and that they were
called

Law of Tenures. 67

engage and swear (f), that they would become Vassals or Tenants (t), and as

F 2

such

called *Homines Liberi* in Opposition to the Villains of those Times. (Vid. Bacon Hist. of Eng. Gov. 56. Brady Introd. to the Hist of Engl. 221. and Sir Wm. Temple Introd. &c. 65.) Thus according to Sir Hen. Spelman, (Gloss. ad verba *Liber Homo*) the Titles *Liber Homo*, *Liberi Homines*, *Liberi* & *Legales homines ad nobiles olim spectabant, maxima enim vulgi pars aliqua servitutis specie coerceretur, sic ut sui esse mancipii non liceret.*

—And it is certain that upon the Introduction of Tenures, these Appellations or Titles were used to denote such Persons as had the most honourable and independent Estates, and came nearest to the Condition of those who were called *Liberi Homines* before. (Vid. Brady Gloss. ad verba *Liberi Homines*). Hence some Time after the Establishment of Tenures, the Freeholders even of private Lords were called *Liberi Homines sui*, as in *Magna Charta Reg. Johannis*, viz. *Nos non concedemus de cetero alicui Quod capiat auxilium de liberis Hominibus suis nisi, &c.* and in *Bracton*, (Lib. 2. Cap. 16. Sect. 8. such Tenant of a private Lord is called *Liber Homo suus*. This sense of the Words *Liberi homines* is warranted by the Historians of those Times, who agree that William I. received the Homage *Omnium Terrariorum Angliæ cujuscunq; feudi essent, &c.* Sup. 53. m.

(f) That Homage was the *Fœdus* answering this Law, is probable from the most ancient Form of it, *Jeo deveigne vostre home, &c.* (ut sup. p. 55 m) which though pronounced by the Tenant, equally obliged the Lord; for Homage according to Britton, (170) *lie deux homes per leur Commun assent* — *Et est un lien de droit dount autant est le Seignieur tenu a son home come le home a son Seignieur forque solement en reverence.* (Vid. Fleta Lib. 3. Cap. 16. Sect. 8, 9.) And that the Oath of Allegiance was the *Sacramentum* required by this Law can hardly be doubted.

(t) That this is the proper feudal Sense of the Word *Fidelis*, appears from *Hotoman*, (de verb. Feudal. ad verb. *Fidelis*,) viz. *Fidales interdum specialiter dicuntur iidem*

68 *An Introduction to the*

such be faithful (u), to *William* as their *Lord*, in respect of the *Dominium* upon the then known feudal Notion residing in a *Feudal Lord*.

2dly, That they would, in Consequence of their becoming his Vassals or Tenants, every where faithfully maintain and defend his their *Lord's* Territories and Title, as well as Person, and give him all possible Aid and Assistance against his Enemies, whether Foreign or Domestick (w).

The

Qui vasalli, Qui feudo accepto in Patroni fide & Clientela sunt, vicissimque suam ei certi obsequii nomine fidem astrixerunt——And according to Sir *Hen. Spelman*, (Gloss. ad verb. Fidelis) *Fideles dicuntur Qui in alicujus clientela sunt ratione Prædii*——*Qui prædia tenent Quod feudum dicitur, &c.* And in this Sense, the Word *Fidelis* is often used in the Book of Feuds. (*Feud. Lib. 1. tit. 1, 5, 10. Lib. 2. tit. 23, &c.*) And in the Direction of several ancient Charters, (*Vid. Hearne's Text. Ross. & Brady Gloss. ad verb. Feudatarii & Fideles*) as well as in this Law.

(u) The Word *Fideles*, thus substantively and adjectively rendered, distinctly answers the *Fædus & Sacramentum* enjoined by this Law.

(w) In Consequence hereof the LIXth Law of this King requires that *omnes Liberi Homines totius regni*——*sint fratres conjurati* (*Vid. LL. Edovardi Cap. 35*) *ad monarchiam*——*& ad regnum*——*pro viribus suis & facultatibus contra inimicos pro posse suo defendendum*——*& pacem & dignitatem Coronæ*——*Integram observandam*.——And the Stat. 7 *Edw. 1. Cap. 1.* declares, that the Prelates, Earls, Barons and Com-

Law of Tenures. 69

The manner of penning this Law, is not less observable than the Terms of it, for though it begins, as many other Laws of this King, with the Word *Statuimus* in the first Person plural, according to the present Stile and Language of Kings (x), without

F 3

ex-

Commonalty of the Realm are bound to aid the King as their Sovereign Lord, to defend Force of Armour, and all other Force against his Peace at all Seasons, when need shall be.——And the LVIIIth Law of *William I.* requires, that *omnes Comites, Barones & servientes & universi Liberi Homines totius regni*——*teneant se semper prompti & bene parati ad servitium suum integrum*——*explendum & peragendum, Cum semper opus adfuerit, secundum quod de feodis debent & tenementis suis de jure (scil't feodali) facere.*

(x) Mr. *Madox*, in his Dissertation Prefatory to *Gervase de Tilbury's Dialogue de scaccario*, (fol. 6.) takes Notice that *pleraque brevia ab ipso (scil't Gervasio) citata stylum Regalem singularis numeri præ se ferunt*,——but that *Henricus secundus annis Imperii sui posterioribus, & post eum omnes Angliæ Reges numero plurali scripserunt Nos & Nostrium, &c.*

But though the singular was, as appears from the most authentick Memorials of those Times, the Royal Stile usual in Writs, Charters, and the like; (*Vid. 2 Inst. 2.*) yet it is no Objection to the Laws of *William I.* that they (in the several Editions we have of them from Mr. *Selden*, Mr. *Lambard*, and Doct'r *Wilkins*) run in the plural Stile; for that, as they were not meer Acts of the King, they were probably penned in this Manner, that they might, at the same Time that they declared the King's Will, intimate the Concurrence of the *Commune Concilium*. And it is observable, that though *Roger Hoveden*, (*Int. Script. post Bedam, 600, 601.*) in his Summary of these Laws, exhibits most of them in the singular Stile; yet

he

70 *An Introduction to the*

express Mention of the *Commune Concilium*; yet we cannot possibly doubt its Concurrence; Because the King himself, being as it seems but *one of more*, is mentioned in the Body of the Law itself as a *third Person* spoken of, and *as such* plainly distinguished from the *Many* speaking in the beginning or enacting Part of the Law, viz. *Statuimus ut omnes affirmant Quod WILLIELMO DOMINO SUO Fideles esse volunt, terras & Honores ILLIUS ubique servare cum Eo*—In the Language of the other Laws of this King, it would have run, that *omnes affirmant Quod NOBIS fideles esse volunt, terras & honores NOSTROS ubique servare cum NOBIS, &c.* so that the particular Penning of this Law may be understood in a great Measure to speak its Importance; for that as it introduced a new Policy subver-

he gives us this LIId, and the LXth Laws of this King in the plural Stile. And Sir *Henry Spelman*, tho' he says that these Laws were for the most part ordained by King *William* in his own Name, is yet of Opinion that they were all made by the Consent of the *Commune Concilium*. *Vide Spelm. Treat. of Parliaments* 61.

Law of Tenures. 71

five of the *Saxon* Propriety, and did consequently affect the whole Nation in an extraordinary and unusual Manner; it is penned as if the King was meerly passive, the more clearly and fully to express the Consent of the *Commune Concilium* to so considerable an Alteration: And that the particular Manner of penning this Law was not accidental, but expressive and important, will farther appear, if the Reader doth but cast his Eye upon the other Laws of this King; for then he must see that none other of them are worded in this Manner: Nay, that the Manner of wording any other of them doth not so much as hint the Concurrence of the *Commune Concilium*: And which is still more remarkable, that even such of them as expressly mention the *Commune Concilium*, do not mention it, as having any Regard or Relation to themselves; but with Reference meerly to this Law; for the 55th

72 *An Introduction to the*
and 58th Laws (y) of this King,
which are the only Laws that menti-

(y) I shall here transcribe these Laws with their Titles, that the Reader may more readily apprehend, and judge of what is above suggested.

LV.

De clientelari seu Feudorum Jure & Ingenuorum Immunitate.

Volumus etiam ac firmiter præcipimus & Concedimus ut omnes Liberi Homines totius Monarchiæ regni nostri prædicti habeant & teneant terras suas & Possessiones suas bene & in Pace libere ab omni Exactione injusta & ab omni Tallagio, Ita quod nihil ab eis exigatur vel Capiatur, nisi Servitium suum Liberum quod de Jure nobis facere debent & facere tenentur, & prout statutum est eis, & illis a nobis Datum & concessum Jure hæreditario in perpetuum per Commune Concilium totius Regni nostri prædicti.

LVIII.

De Clientum seu Vassallorum Præstationibus.

Statuimus etiam & firmiter præcipimus ut omnes Comites & Barones & Milites & servientes & universi Liberi Homines totius Regni nostri prædicti habeant & teneant se semper bene in Armis & in Equis ut Decet & Oportet, & quod sint semper prompti & bene parati ad servitium suum Integrum nobis explendum & peragendum cum semper Opus affuerit, secundum quod nobis de Feodis debent, & tenementis suis de Jure facere, & sicut illis statuimus per Commune Concilium totius Regni nostri præd. & illis dedimus & Concessimus in Feodo Jure Hæreditario. Hoc Præceptum Nostrum non sit violatum ullo Modo super forisfacturam nostram plenam.

on

Law of Tenures. 73

on the *Commune Concilium* (z), do not seem to mention it as concurring in those Laws, but with Reference meerly to this 52d, or some other Law, (if there was any other (a), that is not now extant) introductive of Tenures.

Mr.

(z) The 56th Law hath indeed the Words *Commune Concilium*, but in another Sense, as appears by the Context, (*viz.*) *Statuimus—Ut omnes Civitates—singulis Noctibus Vigilentur & Custodiantur—prout Vicecomes & Aldermanni & Præpositi & cæteri Ballivi & Ministri nostri melius per Commune Concilium ad Utilitatem Regni providebunt.*

(a) Which some may think probable on Account of the relative Words *prout statutum est eis, & illis a nobis datum & concessum Jure Hæreditario in perpetuum per Commune Concilium* in the 55th Law; and of like Words in the 58th Law, *viz. Sicut illis statuimus per Commune Concilium—Et illis dedimus & concessimus in Feoda Jure hæreditario*, which may seem to refer to some Law expressly establishing hereditary Feuds, &c. consequently to some other than the 52d Law, which barely establishes Feuds without declaring their Continuance: But still it seems to me much more-likely, that the relative Words in both these Laws refer to this 52d Law, as the Basis and Foundation of them, and that the Words *Jure hæreditario* in both of them are merely declaratory of the Intent and Meaning of the 52d Law, which tho' it had no express Words of Inheritance could not mean by a meer politic Substitution of *Tenure*, in the Room of the *Saxon Propriety*, to render all Possession arbitrary and precarious, as *original Feuds*; and yet our Ancestors might be too cautious to rely upon the most obvious Consequences, and therefore think such Declarations proper:

74 *An Introduction to the*

Mr. *Selden*, notwithstanding the Evidence of these Laws which he himself hath given us at large in his Notes to *Eadmerus*, is yet of Opinion (b) that the Possessions of *Bishops* and *Abbots* only were made subject to *Tenures* in the fourth Year of *William I.* And

per: And I must confess that I cannot help thinking that the Words *jure hæreditario* in both Laws would be idle and impertinent in any other than such declaratory Sense. It must however be owned that Sir *H. Spelman* and the Lord *Hale*, in their inquiries after the Original of *Tenures*, take no Notice of the 52d Law, but that both of them treat this 58th Law as a substantive Institution: And Sir *H. Spelman* supposes that the Words *Concessimus in Feodo jure hæreditario* in that Law imply, that Feuds were not hereditary before that Grant. *Vid. Spelm. Post. Treat. of Feuds* 45. and *Hale Hist. of Com. Law* 107, 224. In answer to this, I shall take Leave to observe, that the Purview and Occasion of both these Laws were plainly consequential to some former Law; for the King in the 55th Law barely declares that *Omnes Liberi Homines totius Monarchiæ regni nostri* should hold their Lands *bene & in Pace*, free from all unjust Exactions——— And that nothing should be required of them, but the Services due *de jure*, i. e. by the Feudal Law *prout statutum est eis*, which they had consented to, and established——— After this Declaration, the King in the 58th Law very properly requires, that *Universi Liberi homines totius Regni* should on all Occasions be ready to do the Services they ought *de jure facere, sicut illis statuimus per Commune Concilium*, i. e. that they ought to do by the Feudal Law, which was as above established *per Commune Concilium*.

(b) *Tit. of Hon.* 578,—580. And of this Opinion were the Judges of *Ireland*, in the Case of *Tenures* upon the Commission of defective Titles, p. 199.

that

Law of Tenures. 75

that *Thain-lands* were even in the *Saxon Times*, subject to *Knight-Ser-vice* (c), as being included in the *Saxon Expeditio*, a Branch of the *Trinoda Neceffitas*, or *Landirectum* (d), to which such Lands were liable in those Times; and as it could not be denied, but that the Lands of *Bishops* and *Abbots* were in those Times subject to the *Trinoda Neceffitas* as well as *Thain-Lands*; he labours to prove that the Obligations of the *Trinoda Neceffitas* were different, in respect of the one and of the other (e): But as

(c) Vid. Seld. Tit. of Hon. 507, 508, 510, 511, 518, 520.

(d) *Thani lex est*—*Ut tria faciat pro terra sua, Expeditionem, Burghbotam & Brughbotam, & de multis Terris majus Landirectum*—Thus in *English*, the Law touching a *Thane* is—That in respect of his Land, he shall do three Things, (*viz.*) Military *Expedition*, Repairing of *Castles*, and mending of *Bridges*, and for more Lands to do more *Land Duties*, &c. *Spelm. Treat. of Feuds* 17. Mr. *Selden* citing this Law, says that the two last of these Duties, (*viz.* *Burghbota & Brughbota*) are the same that commonly occur in the *Saxon Reservations*, by the Name of *Arcis Pontisque Constructio*, or *Extruectio* (and which, with the other, (*viz.*) *Expeditio*) are together called, in some Charters to the Church of *Canterbury*, *Trinoda Neceffitas*. Seld. Tit. of Hon. 516.

(e) Ibid. 577, 578.

Sir

76 *An Introduction to the*

Sir *Hen. Spelman* hath confuted this Opinion, by proving that the *Expedio* to which the Lands of *Bishops* and *Abbots*, as well as *Thain-Lands*, were subject, was one and the same (f), and that the *Expedio*, to which both were liable, was the military Policy of the *Saxon* Times (g), and very unlike the later Feudal Policy: I need only add, that since it is highly probable, as well from what I have already

(f) *Spelm. Treat. of Feuds*, 22, 23, 43.

(g) Sir *H. Spelman* conceives it to have been a Fundamental Law or Custom of the Kingdom, (as ancient as the Kingdom itself) whereby all the Land of the whole Kingdom was obliged *Trinodæ Necessitati* of military *Expedition*, and *Building* and *Repairing* of *Castles* and *Bridges*; and that all the Land of the Kingdom was wholly tied to these three Services, appeareth, as he says, in the *Council* of *Eanham*, where they are commanded to be yearly done. And by the Laws of *Canutus*, where they are appointed to be done as Necessity requireth. And also by the Law of King *Ethelred*, who about the *thirtieth Year* of his Reign, ordained that every eight *Hides* or *Plough-Lands*, through the whole Kindom, should find a Man with a *Croslet* and *Helmet* to the *Naval Expedition*, and every Three hundred and ten *Plough-Lands*, an ordinary Ship. For these Purposes (says he farther) was the whole Land formerly divided either by *Alfred* the Great, or some other precedent King into 243600 *Hides* or *Plough-Lands*, and according to this Division, were the Military, and other Charges of the Kingdom imposed and proportioned. *Vid. Spelm. Treat of Feuds* 17, 18, &c.

offered

offered concerning the Introduction of Tenures, as from the direct Authority of Sir *H. Spelman* (h), that the *Saxon Expeditio* was first abolished in the Time of *William I.* and that the *Feudal* military Policy was upon the Foot of *Tenure* substituted in the Place of it, and did *then* originally and totally succeed to it, we have little Reason to suppose with Mr. *Selden*, that *Tenures* were *then* ancient in respect of other than the Lands of *Bishops* and *Abbots*, and that the Lands of *Bishops* and *Abbots* only were *then* made subject to Tenures; and we have, I think, the less Reason to incline to this Opinion; because there is no particular Law to be found, by which such Lands were singly subjected; and because the 52d Law of *William I.* by which other Lands are supposed

(h) The old *Saxon* Manner of dividing the Kingdom by *Hides*, and levying Soldiers according to the *Hides* grew now (in the Time of *William I.*) out of Use, and instead thereof, the King's Wars were to be supplied by *Knights Fees*. *Spelm. Treat. of Feuds* 45.

78 *An Introduction to the*

to have been subjected to Tenure, may very well be understood to extend to them.

Supposing this a probable Account (for as such only I offer it) of the Introduction and Establishment of *Tenures*; it may seem Strange that the most ancient Historians should represent them as slavish and tyrannical (i), and that our Ancestors should so soon grow weary of them, as even in the Beginning of *Henry I.*'s Reign, to desire an entire Restitution of King *Edward's Laws* (k), and in them the total Destruction of *Te-*

(i) *Mat. Paris* (*ad An.* 1068, 1070. fol. 6, 7.) represents *Tenures ut servitus Militaris & Jugum perpetuæ Servitutis*, and calls the Law, by which the Ecclesiasticks were subjected to Tenure, *Constitutio pessima*.--*Mat. Westminster* (*Lib.* 2. fol. 1.) says, that the few Estates in the Hands of the English, *Willielmus factus jam ac Rege Tyrannus sub jugo detruxit perpetuæ servitutis*. And the *Saxon Chronicler* (*ad An.* 1085.) supposes that all the Landholders throughout England became, in Consequence of their *Homage* or *Tenure*, *bujus viri (scilicet Willielmi) servi & Vassalli*—from these and like Representations probably the Words *Vassal* and *Vassalage* (which really imported nothing more odious than *Homo* and *Hominium*, or than *Tenens* and *Tenura*) became odious, and are used by us as Terms of Slavery and Reproach, even to this Day.

(k) *Vid. inf.* p. 82.

nure :

Law of Tenures. 79

nure : But these Representations, and these Desires will not appear so Strange, if we consider that, though it may be true, that our Ancestors did consent to the 52d Law of *William I.* which was (as is supposed) conceived in Terms apt and proper to introduce an absolute *feudal* Dependence, and was probably penned by some *Norman Feudist* to answer that End; yet it is not likely that they, who were totally Strangers to the *Feudal* Law, and were ignorant of the Extent and Consequences of it, should understand this Law in that Latitude, it soon borrowed from subsequent Interpretations and Glosses; or that they should mean more, than to oblige themselves, in respect of their Lands to submit to *William I.* as their *Lord* or King, to maintain his Title, and defend his Territories, as vigorously and faithfully as if they had actually received their Lands from him upon express Terms of *Fealty*: But whatsoever their Meaning was,

80 *An Introduction to the*

was, it is not to be wondered at, that *Norman Interpreters* (1), who not only knew the Extent and Import of the Terms of this Law, taken in a feudal Sense, but the Policy and ultimate Design of penning it in a Manner so general and comprehensive, should expound it conformably to the *Norman Reception*, and Notion of FEUDS (m), so as to introduce and

(1) For such they probably were, if we believe *Ingulphus*, who says, that *Comitatus & Baronias, Episcopatus & Prælatias totius terræ suis Normannis Rex (scilicet Willielmus) distribuit, & vix aliquem Anglicum ad Honoris statum vel alicujus Dominii Principatum ascendere permisit.* (*Ingulphus ad An. 1066. Int. Script. post Bedam 901.*) The Reason whereof is given by *Eadmerus*, who says, that *Rex Willielmus*——*Usus atque Leges quas patres sui & Ipse in Normannia habere solebant, in Anglia servare volens, de hujusmodi Personis Episcopos, Abbates, & alios Principes per totam terram instituit, de quibus Indignum judicaretur, si per omnia suis Legibus postposita omni alia consideratione non obedirent, Et si nullus eorum pro quavis terreni Honoris potentia, caput contra eum levare auderet; scientibus cunctis unde, qui, ad quid assumpti fuerint.* *Eadm. fol. 6.*

(m) Feuds being instituted by the Conqueror, the *Norman Manner*, says *Sir H. Spelman*, (*Treat. of Feuds 45.*) was presently pursued here in *England*, as appeareth in *Domesday*, where it is said, *Habet*——*in eodem feudo de W. comite Radulpho de Limes 50 carucat' terræ sicut fit in Normannia*, joining *Normannia* with *Feudum*, to shew us whence it came, and where we should see the Pattern of it.——Thus far then it may

Law of Tenures. 81

and establish not only the *Norman Wardship*, but all the *Feudal* and *Norman* Fruits, and Dependencies of *Fee* or *Tenure*, considered as a *pure original FEUD*, that is to say, as an Estate or Interest in the *Lord's* Lands derived from the meer *Bounty* of the *Lord*; in respect whereof the *Tenant* was obliged to make as large Returns of Service and Gratitude, as if subsisted by such *Bounty* for the sole Use and Service of the *Lord*. Our Ancestors, again, who were not direct *Beneficiaries*, but had barely consented to a *Fiction* of *Tenure* as the meer *Substratum* of a new military Policy, must needs look upon such Fruits or Consequences of *Tenure*, as arbitrary Conclusions from Principles that had not, as to them, any Foundation in Reason or Fact, and as in Truth they were most grievous Impositions; and yet grievous as they were, they fell short of the

may be true, as *Grotius* says, that *Anglia Normannorum Legibus etiam nunc regitur*. Grot. Prolegom. Hist. Goth. 64.

G

Exactions

82 *An Introduction to the*

Exactions advanced upon *Tenures* in the Time of *William II.* our Ancestors therefore harassed and wearied with the Extravagancies of this Reign, earnestly desire to get rid of them, and having upon the Death of this King a favourable Opportunity, as they thought, from the Pretensions of *Henry I.* to obtain the utmost of their Hopes; they demand, and are promised the Restitution of King *Edward's* Laws, and upon this Condition crown him (n): The King, when crowned, instantly by his *Charter* (o) abolished all the evil Customs with which the Kingdom was oppressed (p), defeated the great Grievances of *Tenure* relating to *Relief* (q), *Wardship*

(n) Vid. *Mat. Paris* ad An. 1100. fol. 55. & *Wilk. Int. LL. Anglo-Sax.* 299.

(o) Which is to be found in *Mat. Paris*, fol. 55. and in *Lambard and Wilkins Int. LL. Hen. 1. Cap. 1.* and in *Hearne's Textus Roffensis* 51.

(p) *Omnes malas Consuetudines quibus Regnum Angliæ injuste Opprimebatur inde Aufero.* Vid. *Chart. Hen. 1. ibid.*

(q) *Siquis Baronum meorum, comitum vel aliorum qui de me tenent, mortuus fuerit: Hæres suus non redimet terram suam, sicut faciebat tempore fratris mei,* (or as according to *Mat. Paris*, *sicut facere consueverat tempore patris*

Law of Tenures. 83

ship (r) and Marriage (s), and then restored the Laws of King Edward in all Respects, saving Tenures, which he retained as Amendments made by his Father, with the Assent of his Barons (t). Our Ancestors, notwithstanding the Laws of Tenure were retained, and King Edward's Laws were not, as to them, restored, were yet satisfied and easy under this Charter; and so continued until the Reign of King John, (u) when the old Grievan-

G 2

ces

patris mei) sed legitima & iusta relevatione relevabit eam; similiter & Homines Baronum meorum legitima & iusta relevatione relevabunt terras suas de Dominis suis. Ibid.

(r) *Et Terræ & Liberatorum custos erit, siue uxor siue alius propinquorum qui iustus esse debet, &c. Ibid.*

(s) *Siquis Baronum vel aliorum Hominum meorum filiam suam nuptum tradere voluerit, siue sororem, siue Neptim siue cognatam, mecum inde loquatur. Sed neque Ego aliquid de suo pro hac licentia accipiam, neque ei defendam, quin eam det, excepto si eam jungere velit inimico meo. Et si mortuo Barone vel alio Homine meo, filia Hæres remanserit, Illam dabo consilio Baronum meorum cum terra sua, &c. Ibid.*

(t) *Lagam Regis Edwardi vobis reddo cum illis Emendationibus quibus eam pater meus Emendavit. Ibid.*

— These Amendments could be no other than the *transmarinæ Neustriæ*, (i. e. *Normanniæ*) *Leges quæ ad Regni Pacem tuendam efficacissimæ videbantur*, that is to say, no other than the Laws relating to military Tenures. *Vid. Spelm. Treat. of Feuds 44 & LL. W. 1. Cap. 63.*

(u) For the Charter of Henry I. was confirmed by
King

84 *An Introduction to the*

ces were revived and aggravated to that Degree, that the *Barons*, or *liberi homines regni*, confederate and resolve to get rid of them (w), and to that End demand a Confirmation of the *Charter* of *Henry I.* but the King denying it, they, by Menaces and Force at Hand, urge their Demands, but the King still refusing to comply with them, the *Barons*, we may suppose, lowered their Demands, and propounded certain *Capitula*, or Claims of Right, (x) which the King with Difficulty came into, but at length allowed under Seal, and the *Charter* called *Charta Johannis* was in Consequence thereof sealed 15 June in the 17th Year of his Reign, which not only fell short of the *Charter* of

King *Stephen*, and by *Henry II.* *vid. Wilkins LL. Anglo-Sax. 310, 318.* And no doubt by *Richard I.* likewise.

(w) Although the Grievances relating to Tenure were not the only Grievances of these Times, yet as they were first redressed, and are the subject Matter of near one third of King *John's* Charter, they were no doubt the most considerable.

(x) The Original *Capitula* are still extant, and appear from the Title, (*viz. Ista sunt Capitula quæ Barones petunt*)

Law of Tenures. 85

of *Henry I.* (y) but materially varied from the *Capitula* agreed to, and was yet fuller than that, we now have, of *Henry III.* (z)

petunt et Dominus Rex concedit) as well as from the Nature of them to have been Claims of Right.

The Publick is obliged to *William Blackstone*, Esq; Barrister at Law, &c. for a very accurate Edition of these *Capitula*, and of the several Charters of *K. John* and of *Henry III.*, &c. printed at Oxford 1759, to which I beg leave to refer the reader, when he sees occasion to consult them.

(y) That King *John* did not absolutely comply with the Barons first Demand of *Henry I.* his Charter, appears from the mighty Difference between that and this King's Charter, as to the Articles relating to Wardship, Marriage, &c. which, upon comparing the two Charters, will be too obvious to escape the Reader's Observation: Besides it is probable from *Mat. Paris* his Account of the Manner of obtaining King *John's* Charter, that when an absolute Confirmation of *Henry I.* his Charter was not to be had, the Barons waved it, and drew up a *Schedule* of Laws and Liberties they agreed by all Means to insist upon, the Particulars whereof were read to the King, and warmly denied: And yet afterwards upon a Treaty between him and the Barons, the King (says *Paris*) *tandem cum in varia sorte tractassent sine Difficultate* granted the Laws and Liberties contained in his Charter: So that these Laws and Liberties thus granted, after a long and doubtful Treaty, *sine difficultate* or farther Scruple, cannot be supposed to have come up to those Demands which were before thought so unreasonable, that the King, says the same Author, *affirmavit cum Sacramento furibundus, quod nunquam tales illis concederet Libertates, unde ipse efficeretur servus.* Vid. *Mat. Paris* 252—255.

(z) For several important Clauses of King *John's* Charter are omitted in that of *Henry III.*

86 *An Introduction to the*

Having thus far pursued the Inquiry proposed, and having I hope in some Measure shewed, that Tenures, howsoever grievous or odious they became in their Consequences, were not imposed, but nationally and freely consented to: I shall now proceed to shew, that *Wardship* and *Marriage*, *Relief*, *Aid* and *Escheat*, the Concomitants (a) or Consequences of *Tenure*, were not mere *Norman* Inventions coined for us, but that they were either properly *Feudal*, or were for the most Part entertained as such in *Normandy*, before they were known or heard of in *England*.

I. As for *Wardship* and *Marriage*, though some Authors have thought that they were known in *England* before the Coming of the *Normans* (b); others,

(a) *Bracton* improperly calls them *Concomitantia Servitia*. *Braet. Lib. 2. Cap. 16. Sect. 8.*—*neque enim Warda & relevium sunt servitia, sed tantummodo servitium Militare concomitantur, Itaque melius loqueremur si diceremus tenendriam esse per servitium Wardam & Relevium, aut servitium cum Warda & Relevio. Crag. de jur. Feud. 59.*

(b) *Taylor* infers from a *British Law* by him cited from a Manuscript in his own Custody, *De Leg. Howeli Boni*

others, that they were introduced long after, and not till the Reign of *Henry III.* (c); yet it is plain from the Charter of King *John* (d), from several Records in the Time of *Henry II.* and *Richard I.* (e), and from *Glanvil* (f), who wrote in the Time of *Henry II.* that they were before the Reign of *Henry III.* and it seems as clear from the *Customier of Nor-*

Boni, that *Wardships* were used among the *Britans* before the *Norman Conquest.* *Tayl. Hist. of Gav.* 103, 105. *Vid. Mir. de Just.* 18. and the abovementioned Case of *Tenures* 203.

(c) Sir *Henry Spelman* conceives the Reason that many Authors did suppose this Part of the Feudal Law to have been introduced by *Henry III.* was, because the various Usages, touching *Wardship* and *Marriage*, were not composed into an uniform Law, until the *Mag. Charta* of *Henry III.* did determine them. *Vid. Spelm. Treat. of Feuds* 30. *Seld. Notes on Fort.* 46. *Sir Tho. Smith de Rep. Ang.* 265. *Crag. de Jur. Feud.* 284, 301.

(d) The *Capitula* of the Barons and *Charter* of King *John*, permitting the Lord to take the issues and profits of the Land of his *Ward* without destruction and Wast, and also directing when, and in what condition, he should restore the Land, &c. unto him, plainly suppose (contrary to the Charter of *Henry I.*) the Lord's Title to *Wardship*.

(e) *Vid. Mad. Hist. of the Excheq.* 221, 222.

(f) *Si constet* (says *Glanvil*) *eos (scil't Hæredes) esse Minores, tunc ipsi Hæredes tenentur esse sub Custodia Dominorum suorum, donec plenam habuerint ætatem, s' fuerint Hæredes de Feodo Militari.* *Glanv. Lib. 7. Cap. 9.*

88 *An Introduction to the*

mandy (g), and the Opinions of Mr. *Camden* (h), and Sir *Henry Spelman* (i), that they were of *Norman* Original, and came from *Normandy* as a Branch of the Law of FEUDS or *Tenures*: Though they were in Truth at that Time a new Servitude peculiar to *Normandy* (k), and altogether unknown (says Sir *Henry Spelman*) (l) to other Countries that were governed by the *Feudal* Law.

(g) Cap. 33. De Gard D'orphelins, fol. 53.

(h) By an old Custom, says Mr. *Camden*, derived from *Normandy*, and not (as some write) instituted by *Henry* the Third, when any one dies holding Lands of the King in *Capite* by *Knight-Service*, both the Heir, and the whole Estate with the Revenues of it are in *Ward* to the King, till he has compleated the Age of one and twenty, and then he may sue out his *Livery*. *Camd. Introd. to his Brit.* 187.

(i) *Spel. Treat. of Feuds* 29. & *Gloss. ad Verbum Warda.*

(k) *Appert que ceste Coustume par la quelle le Roy a la garde des Orphelins tenans Fiefs nobles de luy est speciale en Normandie, & est vray semblable avoir este introduite & receue en Angleterre, depuis que les Ducs de Normandie en ont este Roys. Vray est qu'en plusieurs autres lieux de France, entre les Gens nobles le bail (qui vaut autant, a dire come garde) des mineurs vient a pere & mere & autres ascendans, &c. Vid. Terrien. Comment. du Droit, Civil De Duche de Normandie, fol. 187.*

(l) *Treat. of Feuds* 46. *Vid. Stry. Exam. jur. feud. Cap. 7. Q 15, 21, 22. Schilt. Cod. jur. aleman. Cap. 55, 106. Com. 273, 296.*

Hotoman

Law of Tenures. 89

Hotoman therefore speaking of the *Scotch Wardships*, calls them *acerbiora Relevia* (m), not knowing any other Title in the *Feudal Law*, that could comprehend or countenance them; and yet they do not seem to have obtained either here, or in *Normandy* without some Reason; for altho' it is certain that *Wardship* could be no Part of the Law of FEUDS, while they were Arbitrary, Temporary, or for Life only; yet when they became Hereditary, and did consequently often descend upon Infants, who by reason of their Age, could neither perform nor engage for (n) the Services of the FEUD; and yet on Account of their Impotence stood clear of the Feudal Forfeiture for Defect of

(m) *Acerbiora Relevia illa sunt* (says *Hotoman*) *quibus Scoti veterum Regum institutis olim utebantur, nam cum ab uno Rege feuda omnia Recognoscerent, Vasalla Mortuo, prædiorum fructus omnes usque dum Filius unum & vicesimum impleffet Annum, Regibus Relevii causa tribuebant, Werdas autem vocant.* Hot. de verb. Feud. ad verb. Relevium.

(n) *Siquis decesserit filio impubere relicto, Fidelitatem nec ipse, nec alius pro eo facere cogitur.* Feud. Lib. 2. Tit. 26. Sect. 4, 5.

Service

90 *An Introduction to the*

Service (o), *Wardship* of the *Land*, that is to say, the *Custody* of the *FEUD* itself was committed to, or rather retained by the Lord, that he might out of the *Issues* and *Profits* thereof, provide a fit Person (p) to supply

(o) *Non est alia justior causa Beneficii auferendi quam si id, propter quod Beneficium datum fuerit, hoc servitium facere recusaverit—Aliud est si forte ideo non servierit quia non potuerit, tunc enim Feudum non amittet.* Feud. Lib. 2. Tit. 24. Sect. 2. Vid. Hanne-ton. de Jur. Feud. Lib. 3. Cap. 11. p. 337, 338.

An Infant's Service however was according to the *Book of Feuds* to be done by some Body, though the *Text* doth not say who shall appoint the Person, but only says, that *Alius pro eo faciens servitium admittitur.* Feud. Lib. 2. Tit. 26. Sect. 5.——This Omission in the *feudal Text*, leaving Room for Dispute between the Supreme, and other Lords about the Nomination of the Person who should do the Infant's Service, might possibly give Occasion for the Declaration int. *Affis.* Henry II. viz. *Si Hæres de tali ætate non sit quod armis uti possit*——*Ille eum qui habebit in Custodia*——*Inveniet Hominem qui Armis uti possit in servitio Domini Regis,* &c. Wilkins Leg. Anglo-sax. 333.

(p) *Cum ad Infantem Feudum devolveretur qui ex Impotentia debitum Domino servitium præstare non valuit, injustum visum est ut is Feodum amitteret; sed nec illud justum ut quod pactum erat servitium, Dominus non gauderet. Quamobrem Majores nostri æquum duxere, Feodum interim Domino reddi, ut donec Vassallus ad Arma Virilia potens esset, ipse suum servitium curaret præstari.* Spelm. Gloss. ad Verbum Werda. Crag. de jur. feud. 284.——And the *Book of old Tenures* gives a double Reason for *Wardship*, (viz) *que le Seignour ne per-*

Law of Tenures. 91

supply the Infant-Heir's Defect of Service, until he should be of Age to do it himself (q). And howsoever unreasonable Wardships may have appeared to us of late Years; yet if we consider a FEUD, whether positive or fictitious, according to the Import and Design of the Term, and Policy itself, as a Kind of *Stipend* or Reward for actual Service, it cannot seem strange that the Lord should withhold the FEUD, or *Stipend* until his

perdra ceo que de droit il doit aver, & que le poiard de le Roialme de rien ne soit enseble. Vid. old Tenures Tit. *Tenir per service de Chivaler.* And the *Prerogative* by which the King had at Common Law the Lands of *Idiots* held of himself only, may very reasonably be accounted for in the same Manner as *Wardship*: But it does not appear upon what Ground this *Prerogative* was extended by the Stat. de *Prærog. Regis* Cap. 9. (beyond the Notion of *Wardship*) to *Idiots* in general, whether holding of the King, or not, and to all their Lands of whose *Fee* soever they were holden. Vid. 2. Inf. 14. Bacon Hist. of Eng. Gov. 281.

(q) *Tanque al age del Heire de 21 ans le quel est appel pleine age pur ceo que tiel Home per Entendement del ley nest pas able de faire tiel service de Chivaler devant l'age de 21 ans.* Lit. Sect. 103. 1 Inf. 75. b. Vid. Custum. de Norm. Cap. 33. de Garde D'orphelins: But an Heir Female should not be in *Ward* after fourteen Years of Age, because she might at that Age marry a Man able (says Littleton) de faire Service de Chivaler. Lit. Sect. 103. Bract. Lib. 2. Cap. 37. Sect. 3. fol. 86. b. Crag. de Jur. Feud. 284.

Stipen-

92 *An Introduction to the*

Stipendiary or *Feudatary* should be able to answer the Services, in View, or in Consideration whereof it was Originally conferred.

As for the Custody or *Wardship* of the Body, there is no clear feudal Reason to be given for it, and therefore we may suppose that our *Norman* Ancestors might think it reasonable, rather in regard to the Infant-Heir, than with respect to the Lord himself, that the Lord, who had the Custody of the FEUD, the Estate and Livelihood of the Heir, should likewise have the Care of his Body, and the Charge of his Maintenance: Besides, the Lord was, no doubt, the properest Person to have the Care of his Education; because he was most likely to qualify him for the Services of the FEUD, in which (though they were of publick Concern) he was supposed to be most immediately interested (r).

As

(r) Vid. Fortesc. de Laud. LL. Ang. Cap. 44. Seld. Notes on Fort. 46. Smith de Rep. Ang. 264, 265. Cowel Inf,

Law of Tenures. 93

As for *Marriage*, the Lords of our *English Fees* might possibly take the Hint from *Normandy* (f): Tho' I must confess, that in the Sense of our Law, in which it betokeneth the Interest of the Guardian in bestowing a *Ward* in *Marriage* (t), and was understood to be a Beneficial Perquisite of *Tenure*, I can find no express Notices of it earlier than the Stat. of *Merton* (u): By the Custom of *Normandy* indeed a Female Ward was to be married with the Licence of the Lord, and the Joint Consent of him, her Parents and Friends (w): But the Lord had not the absolute Disposal of her, nor had he any Thing to do

Inf. Lib. 1. Tit. 17. Sect. 2. 1 Inf. 75. b. Bacon Hist. of the Eng. Gov. 148, 149.

(f) Vid. Spelm. Treat of Feuds 29, 30.

(t) 1 Inf. 76. a.

(u) Cap. 6, 7.

(w) *Sè feme est in garde quand elle sera en aage de marrier, Elle doibt estre marie par le Conseil & Licence de son Seigneur & par le Conseil & l'assentment de ses Parents & Amis, selon ce que la Noblesse de son Lignage & la valeur de son fief le requerra. Cust. de Norm. Cap. 33. fol. 55.*

Note that *Parens* (according to the Lord Coke 1 Inf. 80. b.) *est nomen generale ad omne genus Cognationis.* Vid. Spelm. Gloss. ad Verb. *Parens*.

with

94 *An Introduction to the*

with the *Marriage* of *Male Wards*, or any Interest in the *Marriage* of *Females*, but a bare Approbation of the Person who in Virtue of the *Marriage* was to become his *Feudatary* (x): By the Charter of *Henry I.* a Daughter of any of the King's Tenants was not even in the Life-Time of her Father to be married without the King's Privy; but then the King was to take nothing for his Consent, nor could he restrain the Father from marrying her to any one that was not his Enemy (y); but this Charter says nothing of the Marriage of Males, nor does it give the least Colour or Countenance to any pri-

(x) *Au Mariage luy, (viz. de feme en garde) doit estre rendu le Fief qui a este en garde——la temps de Mariage luy donne aage & delivre son Fief de garde——if her husband be of Age. Vid. Custum. de Norm. fol. 55.*

(y) *Siquis Baronum vel Hominum meorum filiam suam nuptum tradere voluerit, sive Sororem, sive Neptim sive Cognatam mecum inde loquatur; sed neque ego aliquid de suo pro hac Licentia accipiam, neque ei defendam quin eam det, excepto si eam jungere velit inimico meo. LL. H. I. Cap. 1.——Vid. Spelm. Treat. of Feuds 29. Glanv. Lib. 7. Cap. 12. p. 55. a. Bract. Lib. 2. Cap. 37. Sect. 6. p. 188. a.*

vate

vate Profit or Advantage from the Marriage of Females; nay, so far from it, that the King expressly declares, that he would not accept any Thing for his Consent (z), to the Marriage of a Female during the Life of her Father: And that after the Death of the Father, he would marry her with the Advice of his Barons (a), which plainly shews that Regard was then had to the Marriage of Females only, as to a Matter of publick Concern, and not of private Advantage. Our *English* Lords however by an extraordinary Construction of *Magna Charta*, took upon them not only the absolute Marriage of Female Wards, but of Males too (b); there was indeed some Reason
(as

(z) The Words *neque aliquid de suo*—*accipiam* may be understood, not only to amount to a Declaration that nothing was due, but to a Declaration, that nothing ought to be taken, tho' voluntarily offered.

(a) *Si mortuo Barone vel alio Homine meo Filia hæres remanserit, illam dabo Consilio Baronum meorum.* LL. Hen. I. Cap. 1.

(b) Extending the Words *Hæredes* in *Magna Charta*, Cap. 6. (without Regard to the Custom of Normandy,
to

96 *An Introduction to the*

(as is suggested in the Charter of *Henry I.*) for their Consent to the Marriage of Females, because they might otherwise marry Enemies to the Publick (c), and “so the FEUDS “or *Fiefs* (says Sir *Henry Spelman*) “which were given for Service a- “gainst them, should be transferred “to them” (d). But as to Males, there is no feudal Reason for the Lord’s Consent to the Marriage of them (e), nor is there indeed any Reason, unless, that as it was a Part of the paternal Care (f), our *English* Lords, who had the Care of their

to the Charter of *Henry I.* or to the Usage of former Times. *Vid. Glanv. Lib. 7. Cap. 12.*) as well to Male, as to Female Heirs.

(c) ——— *fuit primes defendu pur ceo que les heires femeles de nostre terre ne se mariaissent a nos enemys, & dounc il nous coviendroit lour Homage prendre, si eux se pussent marier a lour volunte.* Britton, Cap. 67. p. 168.

b. ——— *Sine ipsorum Dominorum dispositione & assensu Mulier hæreditatem habens maritari non potest—Et hoc ideo ne cogatur Dominus Homagium capere de capitali Inimico.* Braët. Lib. 2. Cap. 37. Sect. 6. *Vid. Glanv. Lib. 7. Cap. 12. Mirror 16, 17. 1 Inf. 78. b.*

(d) *Spelm. Treat. of Feuds 29.*

(e) *Nulla poterit esse causa in masculo hærede, quare uxorem non ducat, quæ esse possit in Fæmina cum viro nubat.* Braët. Lib. 2. Cap. 38. Sect. 1.

(f) *Vid. Lit. Sect. 114.*

Per-

Law of Tenures. 97

Persons, might think themselves under an Obligation to take Care of their Marriage: But how it should come to pass, that they should not only claim the Disposal of their Wards in Marriage, but the Profit of their Marriage, I cannot say; unless that, as Disparagement was the only Restraint in *Magna Charta* (g), they thought themselves at Liberty to make all Advantages they otherwise could of it: A Construction so agreeable to the Times, that it was immediately countenanced, and in Effect established by the Statute of *Merton* (h).

II. RELIEFS (i) were not Services,

(g) For *Magna Charta* (Cap. 6.) requires only, that *Hæredes maritentur absque Disparagatione*, omitting the additional Clause in *Charta Johannis*, viz. *Ita tamen quod antequam contrahatur Matrimonium ostendatur propinquis de Consanguinitate ipsius hæredis*: Which gave the next of Kin an Opportunity to prevent Disparagement; which they lost by this Omission, and were, for ought I can see, left to lament it without any Redress, until the Stat. of *Merton*, Cap. 6. Vid. Lit. Sect. 107, 108.

(h) Cap. 6, 7. 20. Hen. 3. 6. —

(i) What they are, and why so called. Vid. Sup. p. 15. in *Marg. Bract. Lib. 2. Cap. 36. Sect. 1. Fleta Lib. 3. Cap. 77. Sect. 1. 1 Inf. 76. a. Spelm. Treat. of Feuds 33. & Gloss. ad Verb. Relevamen.*

H

but

98 *An Introduction to the*

but Fruits of feudal *Tenure* (k), that were not arbitrarily introduced among us by the Conqueror, but were brought into *England* with FEUDS according to the Custom of the feudal Law, and of other Nations, and “ were (says Sir *Henry Spelman*) so various and uncertain, that the Lords “ exacted what they listed for it, when “ the FEUD fell into their Hands upon the Death of their feudal Tenant, constraining the Heir, as it “ were, to make a new Purchase of the “ FEUD (l), and although the Lord

(k) *Relief est un profit del Seigneurie.* 2 Ro. A. 514. D. 3. — *nest un Service eins incident al Service.* Ibid. 515. D. 4. 3 Rep. 66. 1 Inf. 83. a. And it appears from the Dialogue of the Exchequer, that Reliefs were not Services, and that it was doubtful in *Henry II.* his Time of what Nature they were; for the Author of that Dialogue speaking of Reliefs says, that they were a Kind of Obventions, *quæ non videntur prorsus inter oblata computanda, sed magis fines ad Scaccarium dicuntur.* — And the same Author adds, that *sunt qui credunt eos qui in releviis regi tenentur, nec Summoniti solvunt, Spontaneorum Oblatorum legibus obnoxios; ut cum solvendo non fuerint, careant impetratis: ac verius dici potest, ut sicut de Pecuniariis pœnis fit, sic fiat de Releviis; debita namque filiis ratione successionis hæreditas a lege sponte Oblatorum videtur excludere.* Gerv. Tilbur. Dialog. de Scacc. edit. per Madox, Cap. 21.

(l) *Spelm. Treat. of Feuds* 33.

Coke

Law of Tenures. 99

Coke (m) supposes *Reliefs* to have been certain at the Common Law; Yet they were probably with us originally uncertain, as by the Feudal Law, and were no doubt on this Account one of the greatest Grievances of *Tenure*: Inasmuch as an unreasonable *Relief* did in Consequence amount to a Disinheritance of the Heir (n): They seem however to have been reduced, some Time after the Establishment of *Tenures*, to some Certainty by the Laws of *Willi-*

(m) The Lord *Coke* supposes that the lawful and just Relief mentioned in *Henry I.* his Charter to be paid by an Earl and Baron, was certain, viz. the fourth Part of the yearly Value of his Earldom or Barony, and that the second Chapter of *Mag. Charta* was but a Restitution and Declaration of the ancient Common Law. 2 *Inf.* 7, 8. And yet he elsewhere, (1 *Inf.* 76. a.) says that the Relief of a Knight's Fee was, as some hold, certain by the Common Law, but that the Reliefs of Earls and Barons were uncertain, and were therefore called *rationabilia Relevia*, until the Stat. of *Mag. Charta*, cap. 2. limited them in certain.

(n) It is very likely that those Historians, who say that the Conqueror disinherited many of his Nobles without the Judgment of their Peers, point at arbitrary Reliefs, since they are the very first temporal Grievance (a Grievance therefore no doubt of the worst Consequence) that is redressed by the several Charters of *Henry I.* King *John*, and *Henry III.*

100 *An Introduction to the*

am I. (o) *William II.* broke through these Laws, and exacted arbitrary *Reliefs*, as due by the Feudal Law: And therefore *Henry I.* in his Char-

(o) *De Relevio Comitis quod ad Regem pertinet*, VIII *Equi Ephippiati & frænis ornati*, IV *Loricæ*, & IV *Hammes* (*Galeæ Wilkins*) & IV *scuta* & IV *Hastæ*, & IV *Enses*, les autres IV *chaceurs* (alii cæteri IV *veredi* Wilkins) & *Palfreædi cum frænis & Capistris*. Vid. Leg. Gul. I. Cap. 22. apud Lamb. de priscis Angl. Leg. & Seld. Notes ad Eadmer. 180. & Tit. of Hon. 556.

De Relevio Baronis IV *Equi cum sellis & frænis Ornati & Loricæ II & II Hammes* (*Galeæ Wilkins*) & *scuta II & II Hastæ & II Enses*, & les autres II un *chaceur* (& alii cæteri II, unus *Veredus* Wilkins) & unus *Palfreædus cum fræno & Capistro*. Vid. LL. Gul. I. Cap. 23. Ibid.

De Relevio Vavasoris ad Ligium suum Dominum *Quietus esse debet per Equum son piep* (patris sui Wilkins) *talem qualem habuerit tempore mortis suæ*, & per *loricam suam* & per *son Hauve* (per *Galeam* suam Wilkins) & per *scutum suum*, & per *Hastam suam*, & per *Ensem suum*, & si adeo fuerit inermis ut nec equum habuerit nec arma, per centum solidos. LL. Gul. I. Cap. 24. Ibid.

It may not be improper to observe upon these Laws, that if it should seem strange to any Body, that *William I.* should contrary to the Customier of Normandy (Cap. 34. de Relief, fol. 56. b.) require *Reliefs* to be paid in Arms and Habiliments of War, instead of Money, Sir *Henry Spelman* (*Treat. of Feuds* 32.) says, that it is very probable that *William the Conqueror* raising the Form of the feudal Law in England, and drawing the *Saxon* Customs to cohere therewith as much as possible, did turn the *Danish* Law of *Heriots* (Vid. Leg. Canuti Tit. 69. de Hereotis apud Lamb. de priscis Angl. Leg. fo. 123.) into this of *Reliefs*. And the rather because the ancient feudal *Relief* was of this Nature. Vid. Sup. p. 15. a.
ter

ter declares, that an Heir should not *redeem* his Land as in the Time of his Brother, but should have it upon a *just* and *lawful Relief* (p), which is declared by one of his own Laws (q) to be very near the same with the *Relief* established by the Laws of *William* I. (r) but if this be so, it

H₃ may

(p) *Si quis Baronum meorum, Comitum vel aliorum, qui de me tenent, mortuus fuerit; hæres suus non redimet terram suam sicut faciebat tempore fratris mei, sed legitima & iusta relevatione relevabit Eam. LL. Hen. I. Cap. 1. Roll suggests the Cause, as well as Effect of this Clause in Henry I. his Charter, viz. Devant le lemps de H. I. le Roy & auters Seigneurs usoint a faire l' heires de lour mort tenants a redeemer lour terres ——— mes H. I. abrogate cest male Custome & ordein l'heirs del mort tenants del Roy, & d'auters Seigneurs relevarent terras de Dominis suis, non redimerent. 2 Roll. Ab. 514. D. 1, 2.*

(q) *Sint relevationes singulorum sicut Modus fit, Comitibus VIII Equi, quatuor sellati & quatuor sine sella, & Galeæ III, & Loriceæ III cum VIII lanceis & totidem scutis & Gladiis III. & centum Mancæ Auri. Postea Thayni Regis qui ei proximus fit, quatuor Equi, duo sellati & duo infellati, & duo gladii, & quatuor lanceæ & totidem scuta & Galea cum Lorica, & L Mancæ Auri. Et Mediocris Thayni Equus cum apparatu suo & Arma ejus, &c. Vid. Leg. H. I. Cap. 14. de relevationibus. Apud Lamb. de priscis Ang. Leg.*

(r) So that the Lord Coke, (2 Inf. 8.) citing the above-mentioned Laws of William I. out of an ancient MS. in the Library of Archbishop Parker, not as Laws of William I. fixing Reliefs, but as Notices of the unjust Reliefs exacted in the Time of William II. and as such widely

102 *An Introduction to the*

may seem strange, that, notwithstanding these Laws of *William I.* and this declaratory Law of *Henry I. Glanvil*, who wrote in the Time of *Henry II.* should say (f), that the *Relief* of a *Knight's Fee* was C. Shillings, *de Baronis vero nihil certum statutum est, Quia juxta Voluntatem & Misericordiam Domini Regis solent Barones Capitales de Releviis suis Domino Regi satisfacere*: But *Glanvil* is not to be understood, as if he meant that the *Relief* of a *Barony* was absolutely uncertain (as by the Feudal Law all *Reliefs* originally were); but that a Commutation or Composition for the *Relief* was not certainly established either by the Laws of *William I.* or of *Henry I.* as it was in the Case of the *Relief* of a *Knight*; for the Words *juxta Voluntatem Regis solent Barones Capitales de Releviis suis Do-*

widely different from the just and lawful *Reliefs* intended to be restored by the Charter of *Henry I.* was undoubtedly mistaken.

(f) Lib. 9. Cap. 4. p. 71.

ending

mino Regi satisfacere import no more, than that, if the *Relief* of a *Barony* was not rendered but compounded for, the King must be satisfied for (or concerning) it to his Content: So that the Composition for the *Relief* and not the *Relief* itself, of an *Earldom* or *Barony* remained uncertain, until it was ascertained by the Charters of King *John*, and of *Henry III.* (t) which, instead of the *Relief* established by the Laws of *William I.* and *Henry I.* consisting of Horses, Arms, and Things of the like Nature, restored the more ancient *Norman Relief* in Money (u).

H 4

The

(t) Vid. Seld. Tit. of Hon. 553, 576.

(u) *Par toute Normandie relief est generalment determine en Fief de Haubert par quinze livres, en Baronie par Cent livres.* Custum. de Norm. Cap. 34. de Relief, fol. 56. b. without any Distinction between an *Earldom* and *Barony*—King *John's* Charter (according to the Copy I have of the supposed Original in the Cotton Library) distinctly mentions *Earls* and *Barons*, and yet makes no Difference between the ancient *Relief de Baronia Comitum & de Baronia Baronum*, fixing the *Relief* of both (*viz. de Baronia Comitum integra & de Baronia Baronum integra*) *ad centum Libras*: So that the Agreement between this Charter and the Customier of *Normandy* suggests, that the one was probably formed from the other.

Note too, that there are Copies of *Henry III.'s* Charter

104 *An Introduction to the*

The *Relief* of *Soccage* Lands was fixed by the 40th Law of *William I.* at a Year's Rent (w), and remains the same

ter still extant, which are supposed much more ancient than the *Inspeximus* of *Edward I.* in which, instead of the present Words *de Comitatu integro*, the Words *de Baronia Comitatus integra* (as in King *John's* Charter) are retained, and no Difference is made between the *Relief de Baronia Comitatus* & *de Baronia Baronis*: But both are fixed as in *Charta Johannis ad centum Libras*, and it now appears from the Original Charter of *Henry III.* that in this Respect there is no Difference between the Charters of *K. John* and of *Henry III.*

(w) It must be observed, that by the Custom of *Normandy*, no other *Fiefs* or *Fees* paid *Relief*, than such as were held by *Homage*; for according to the *Custom. de Norm. Cap. 34. fol. 56. b. relief & Hommage sont aussi comme conjoincts ensemble: Car par tout ou il ya relief, il convient que Hommage y soit: Combien que par tout ou il ya Hommage, il ne convienne pas avoir relief.* *Bracton* therefore, having treated of *Reliefs* due from military *Fees*, proceeds upon this or a like Notion of *Relief* to inquire, *Si de Soccagio dari debeat Relevium, cum de Soccagio non competat Domino capitali custodia nec Homagium, & ubi nulla custodia, ibi nullum Relevium, sed e contrario.* And concludes accordingly, *Quod de Soccagio non datur Relevium — fit tamen (lays he) de necessario Domino Capitali quædam præstatio ab Hærede propter Dominium & Domini Recognitionem, & quæ prædictis rationibus dici non poterit Relevium, & quæ talis est, viz. Cum teneatur Sockmannus defendere teneamentum suum erga Dominum suum per certum redditum — loco relevii in Recognitionem Domini dabit teneans Domino suo, & Hæres una vice Redditum suum unius Anni duplicatum, sed quod non solvat redditum, & postea duplicatum, sed quod solvat redditum, & postea tantundem in Simplum.* (*Bract. Lib. 2. cap. 36. Sect. 8.*) And according to *Bracton's* Notion, it is declared by the *Stat. 28 E. 1. of Wards and Relief*, that when any *Relief*

same to this Day: Although it is not taken Notice of in any of the Charters of *Henry I.* King *John*, or of *Henry III.*

III. AIDS called by Sir *Henry Spelman* Tribute (x), and by our old Authors *Auxilia*, were meer *Benevolences* rendered by a Tenant to his Superior or Lord, in Times of Difficulty and Distress (y), and were not of direct

is given, the *Wardship* is incident, and contrariwise.—And that a free *Sokeman* shall not give *Ward* or *Relief*; but that he shall double his Rent after the Death of his Ancestor. But this Stat. of *Edward I.* and *Bracton* thus opposing the double Rent to be paid by a *Soccage* Tenant to *Relief*, must be understood to speak of the *Relief* restored by *Magna Charta*, Cap 2. which was but a fourth Part of a Year's Value, and extended only to military Tenants; whereas a *Soccage* Tenant remained subject according to the 40th Law of *William I.* to *Relief* at a whole Year's Rent, viz. *eorum qui fundum suum tenent ad Censum sit rectum Relevium tantum, Quantum Census annuus est.* And a Year's Rent, thus established as the *rectum Relevium* of Lands held by *Soccage* Tenure, hath been constantly taken as a *Relief* ever since. *Vid. Glanv. Lib. 9. Cap. 4. fol. 71. a. Fleta Lib. 3. Cap. 17. Sect. 11. Lit. Sect. 126, 127. 2 Ins. 232. 2 Ro. Ab. 515. E. 2, 3.*

(x) Treat. of Feuds 59.

(y) *Sunt quædam Consuetudines quæ servitia non dicuntur, nec concomitantia servitiorum, sicut sunt rationabilia auxilia ad filium primogenitum militem faciendum, vel ad filiam primogenitam maritandam, quæ quidem auxilia fiunt de gratia & non de jure, & pro necessitate & Indigentia Domini Capitalis. Nunquam igitur exigitur*

106 *An Introduction to the*

rect Feudal Obligation (z), but first obtained out of a pious Regard to the Person, and Occasions of the Lord: The Kind therefore, as well as the *Quantum* of every *Aid*, was originally as various and uncertain, as the particular Occasions of every distinct Lord, and as the Abilities and Disposition of each particular Tenant: But as *Benevolences* or *Aids* grew frequent, the more usual *Renders of Regard* became in many Countries established *Renders of Duty* (a). Thus in *Normandy* the three most usual and frequent *Aids*, that is to say, to make the Lord's eldest Son a Knight, to marry his eldest Daughter, and to ransom his Person, became due and payable to the Lord, as fixed and e-

tur Auxilium, nisi præcedat Necessitas, nec tenetur aliquis ad hujusmodi Auxilium præstandum nisi ex Indigentia Domini sui Capitalis, & ex eo quod est Liber Homo suus. Bract. Lib. 2. Cap. 16. Sect. 8. Fleta Lib. 3. Cap. 14. Sect. 9.

(z) For, according to *Bracton* and *Fleta*, *Hujusmodi Auxilia sunt personalia & non Prædialia. Ibid. Vid. sup. p. 41, 42.*

(a) *Quod ex gratia primum largiebatur, Jure postea Exigitur, & pro Voluntate Dominorum. Spelm. Gloss. ad Verb. Auxilium.*

stablished

Law of Tenures. 107

Established Aids (b); and beside them there was one of an inferior Nature, which respected only inferior Lords, and that was an *Aid* to enable the Lord to pay his Relief, and was therefore called *Aide de relief* (c); we became not only subject to the three capital *Norman Aids* (d), but to the *Aide de Relief* likewise (e): And

(b) *En Normandie a trois chevelz Aides (qui sont appelez Chevelz, pource que ils doibuent estre payez aux chief Seigneurs) Lun est — faire laisme filz de son Seigneur Chevalier. Le second a son ainsnee fille marier, Le tiers a rachapter le corps de son Seigneur de prison, quand il est pris pour la Guerre au Duc. Custum. de Norm. Cha. 35. fol. 57. b.*

(c) *Aide de Relief est due quand le Seigneur meurt, & son Heir relieve vers celuy de que il tenoit son fief, & cest Aide doit estre fait per demy relief. Custum. de Norm. Cap. 34, fol. 57. a.*

(d) Vid, Seld. Jan. 65. Epin. 18. Madox Hist. of the Excheq. 396.

(e) Inferior Lords had also, says Mr. Madox (*Hist. of the Excheq.* 428.) of their Tenants *Aid* to enable them to pay the Fine for their Relief or Seisin of their Inheritance. — And that such *Aid* was taken in Henry II's Time appears from Glanvil (Lib. 9. Cap. 8.) viz. *Postquam convenerit Inter Dominum & Hæredem tenentis sui de rationabili relevio dando & accipiendo, poterit Idem Hæres rationabilia Auxilia de Hominibus suis inde exigere* — And that the like Aid was taken in Scotland, appears from Crag. (*de Jur. Feud.* 213.) viz. *In relevio pro sua terra solvendo, post expletam custodiam vassallus Dominum Juvare tenetur.*

thus

108 *An Introduction to the*

thus far our Ancestors may be said to have gone into the *Norman Notions* of *Aid*: But they did not stop here; for it appears by several Instances in the Time of King *John*, that they carried their Notions of *Aid* a good deal farther; insomuch that inferior Lords took of their Tenants *Aid* not only to enable them to pay their Fines made with the King, but to pay their Debts (f) likewise: And it was doubtful in *Henry II.*'s Time, whether Lords might not require *Aids* towards their military Expeditions (g), but this Doubt was settled, and the two inferior Aids above-mentioned were, together with the *Aide de relief*, effectually abolished by the following Clause of King *John*'s Charter, (*viz.*) *Nos non concedemus de cæ-*

(f) Vid. Madox Hist. of the Excheq. 428.

(g) *Utrum vero ad guerram suam manutenendam possint Domini hujusmodi Auxilia exigere Quæro. Glanv. Lib. 9. Cap. 8.* And that such Aids were taken in other Countries, appears from *Du Fresne. Gloss. and Verbo, Auxilium Tit. Auxilium pro Militia Domini.*

tero alicui quod capiat Auxilium de liberis Hominibus suis, nisi ad corpus suum redimendum, & ad faciendum primogenitum filium suum Militem, & ad primogenitam filiam suam semel Maritandam, & ad hæc non fiat nisi rationabile Auxilium.

Whilst inferior or mesne Lords did, as above, under the Notion of *Aid*, impose upon their Tenants, the King, the supreme Lord, was not behind hand with them, but he demanded and had of them, and of all other his Tenants in *Capite*, various *Dona* or *Aids* (h), that were not warranted by the *Norman* Notions of *Aid*, nor could be inferred from any just Notion of *Tenure*: These *Dona* or *Aids* therefore were likewise restrained by the following Clause of King *John's* Charter, (*viz.*) *Nullum — Auxilium ponatur in regno nostro nisi per Commune Consilium Regni nostri, nisi*

(h) Vid. *Madox Hist. of the Excheq.* 417—421.

110 *An Introduction to the*

ad Corpus nostrum redimendum, & primogenitum filium nostrum Militem faciendum, & ad filiam nostram primogenitam semel Maritandam, & ad hæc non fiat nisi rationabile Auxilium

——Et ad Habendum Commune Consilium regni de Auxilio assidendo, aliter quam in tribus Casibus prædictis

——Summoneri faciemus Archiepiscopos, &c. This Clause is omitted in *Henry III.*'s Charter, and the old *Aids* were again revived and taken, until the 25 *Edward I.* when this important Clause of King *John*'s Charter was effectually revived or restored by the Stat. 25 *Edward I. Cap. 5, 6.* declaring and granting “ That the Aids, “ Tasks, or Prises, which had been “ given by his People before-time of “ their own Grant, and good Will, “ should not be drawn into a Custom for any Thing that had been “ done, notwithstanding any Roll or “ Precedent that might be found “ ——And that he would from
thence-

Law of Tenures. III

“ thenceforth take no such Aids,
“ Tasks nor Prises, but by the com-
“ mon Assent of the Realm, and for
“ the common Profit thereof, saving
“ the ancient Aids and Prises due
“ and accustomed”. These *ancient Aids* were (according to the Lord Coke) (i), the *Aids pur file marier*, & *pur faire fitz Chevalier*; which were certain by the Custom of *Normandy* (k), but were with us arbitrary and uncertain (l) until the Statute of *Westm. 1. Cap. 36.* fixed the *Aid* of a *Knight's Fee* at 20s. and of *Soccage Lands* to the Value of twenty Pounds a Year, at 20s. and so *pro*

(i) 2 Inf. 529.

(k) Ces Aides, (viz. les trois Chevels Aides) sont payez en aucuns fiefs a demy relief, & en aucuns fiefs a tiers de Relief. Il ya aucuns fiefs en quoy les vavassouries seulent payer dix sols de Aide. Custum. de Norm. Cap. 35. fol. 58. b.

(l) As appears by the Preamble of the Stat. of *Westm. 1. Cap. 36.* viz. *Pur ceo que avant ceux heures ne fuit unques reasonable Aid a faire leigne fits chevaler, ne a leigne file marier mise en certain, ne quant ceo devoit estre prise, ne quel heure, per quoy les uns leverent Outragious Aide, & plus tost que ne sembleit mestier, dount la Peuple se sentit greve Purview est, &c.* Vid. 2 Inf. 232. Seld. Tit. of Hon. 649.

112 *An Introduction to the*

rata. But this Statute was not understood to extend to the King, and therefore he levied *Aids* of this Nature afterwards by an higher Rate (m), until he was restrained by the Statute 25 *Edward III. Cap. 11.* which declares, that “reasonable Aid to
“make the King’s eldest Son a
“*Knight*, and marry his eldest
“Daughter, shall be demanded, and
“levied after the Form of the Statute
“thereof made, and not in other
“Manner, that is to say, of every
“*Knight’s Fee* holden of the King
“20 s.———and of every twenty
“Pounds of Land holden of the
“King in *Soccage* 20 s. and no more”.

The Statute of *Westm. 1.* takes no Notice of the *Aid ad Corpus redimendum*, nor doth the Lord *Coke*, or any of our ancient Law-Books mention any such *Aid* (n), but on the contrary

(m) Vid. Seld. Tit. of Hon. 650. F. N. B. 82. F.

(n) Mr. *Selden* (Tit. of Hon. 649.) says, that he doth not remember that there is any Mention, in any of our published

Law of Tenures. 113

contrary, they confine the ancient Aids, saved by the Statutes of *Westm. i.* and 25 *Edward I.*, to the Aids *pur faire firs Chevalier & file marier* only (o); and yet the *Aid ad Corpus redimendum* was one of the ancient Aids expressed in the Charter of King *John*, and, although it is not mentioned in the Statute of *Westm. i.*, might, and did no doubt re-

published Law-Books, of the Aid for Ransom of the Lord, though by the Way (says he) in the MS. Years of *Edward the First*, a Release made by one *Robert of Benitham*, to the Abbot of *Ford* of all Services, *forpris fuit real & reasonable Aide, pur luy raindre hors de prison, du ces heires, quel heure qu'ils fuissent en prison*, is pleaded in Bar of an *Avowry*; and since Mr. *Selden* wrote, Justice *Croke* in Mr. *Hampden's Case* says, that the ancient Aids saved by the Stat. 25 *Edward I.* were *ad redimendum corpus, ad filium primogenitum militem faciendum, & ad filiam primogenitam maritandam*— And the Lord *Hale* in his *Analysis* mentions this Aid *ad corpus redimendum*, as a Branch of the King's extraordinary temporal Revenue.

(o) The *Aid ad corpus redimendum* was, in the Opinion of *Crag.* dropt likewise in Scotland; for he says, that *Dominum in filia primogenita elocanda opibus juvare tenetur (Vasallus) & etiam ut ejus primogenitus equestri Dignitate decoretur, & pro his duobus Dominus pecuniarum opem exigere potest*—In aliis *Dominum pecunia juvare non tenetur Vasallus, licet sint qui Dominum captum in Bello, quod sine sua Culpa contraxerat, a Vasallo, ut redimatur ab hostibus, juvari putant debere.* Vid. *Crag. de jur. Feud. fol. 213.*

114 *An Introduction to the*

main (p), notwithstanding that Statute, which meant only to regulate and ascertain the *Aids pur faire*

(p) There is a notable Record of the 17 Edward II. printed at large by Mr. Madox (*Hist. of the Excheq. fol. 428. in Marg.*) which proves that the *Aid ad corpus redimendum* was in those Days, *tam naturali æquitate quam ex fidelitatis debito*, demandable, and which, at the same Time that it proves this, suggests the original Nature of Aids in general; I shall therefore give it the Reader as I have it from Mr. Madox, viz. *Rex Universis & singulis tenentibus Johannis de Britannia Comitis Richemundie Consanguinei nostri carissimi, salutem. Recolentes non sine Cordis amaritudine, qualiter præfatus Consanguineus noster dum nostris Obsequiis intendebat, per inopinatum & repentinum Scotorum Inimicorum & Rebellium nostrorum Aggessum, captus extitit, & ad partes Scotiæ ductus per eosdem, & adhuc penes ipsos est detentus, nec ab eorum manibus sine magna & intolerabili Redemptione poterit deliberari, de ipsius Angustiis eo fortius molestamur, quo nostris affectibus intimius conjungitur, & ipsius fidelitatis & Industriæ semper in nostris agendis evidentius probavimus puritatem; Et quia ad Deliberationem dicti Domini vestri a manibus dictorum Inimicorum tam naturali æquitate quam ex fidelitatis vestræ debito, manus extendere tenemini adjutrices: Vos & quemlibet vestrum rogamus & requirimus ex affectu, quatenus unusquisque vestrum juxta facultates suas, & quantitatem tenuræ suæ, pro Redemptione dicti Domini vestri, tale & tantum subsidium studeat ministrare, ut Idem Dominus vester, vestro Auxilio mediante, a dictorum Inimicorum manibus celeriter deliberari valeat, de quo vestram possumus Benevolentiam & fidelitatem erga dictum Dominum vestrum ex merito commendare, & vobis etiam grates referre debeamus; Et ut Idem Dominus vester, cum redierit, vestris profectionibus, ob impensum sibi a vobis in tanto Necessitatis articulo præsidium, specialiter astringatur. Teste Rege apud Grenhou, primo die Septembris, per ipsum Regem. Pat. 17 E. 2. p. 1. M. 15.*

fits

Law of Tenures. 115

fits Chevalier, & file marier; because they were not only grown excessive, but were taken oftner (says the Statute) than seemed necessary, and were become, by reason of their Frequency, as well as Excess, too great a Grievance, and of too much Importance to remain longer uncertain: Whereas the *Aid ad Corpus redimendum* was less frequent, and by no Means capable of any Certainty, Restriction, or Excess; it being necessary, and of the highest Consequence, with Regard especially to the Supreme Lord, that the Lord, as often as he should be taken Prisoner of War, should at any Rate be ransomed.

IV. When a FEUD or Fee determines for want of Heirs, or *propter Delictum tenentis*, the Land falls back (q) to the Lord, and the Land

I 2

re-

(q) Thus, in the Language of *Glanvil* and *Bracton*, *revertitur terra ad Dominum Capitalem vel ad rectum Dominum, scil't ad ipsum de cujus feodo est. Vid. Bract. L. 3. fol. 130. L. 4. fol. 160. b. Glanv. L. 7. Cap. 17. p. 59.*

116 *An Introduction to the*

returning to the Lord upon such Determination of the *Fee* or *Tenure* is called an *Escheat*, and is as such reckoned by our *English* Lawyers (r) among the Fruits or Perquisites of *Tenure*, though it cannot, properly speaking, be a Fruit of *Tenure*; the Land or Tree itself, says Sir *Henry Spelman*, resulting to the Lord upon a Determination of the *Fee* (f).

Sir *Henry Spelman* (t) divides *Escheats* into *Regal* and *Feodal*. “*Regal*” (says he) are those Obventions and “*Forfeitures*, which belong generally “to Kings, by the ancient Rights “of their Crown, and Supreme Dignity. *Feodal*, which accrue to every *Feodal* Lord, as well as to the “King, by Reason of his *Seignior*y.” This Division is indeed agreeable enough to the general Import of the

p. 59. a. And *Brañon* in another Place (*L. 5. Cap. 6. fol. 375.*) says that *Reascendit ad Capitales Dominos a quibus primo processit.*

(r) *Hale Anal.* 54.

(f) *Treat. of Feuds* 37.

(t) *Treat of Feuds. Ibid.*

Word *Escheat*, as formed from the *French* Word *Escheoir* to happen, and primarily signifying any Thing coming accidentally, or by Chance (u), and in such Sense comprehending casual Obventions and Forfeitures of all Kinds. But strictly speaking according to the legal Notion of an *Escheat*, it imports something happening, or returning to the Lord upon a Determination of *Tenure* only; and in this Sense all *Escheats*, even to the King, are properly *Feudal*, and such Lands or Tenements, as are not held immediately of the King, and yet happen to him upon the Commission of any *Treason*, are not *Escheats* (w), but Forfeitures (x), which were given to

I 3

the

(u) Spelm. Gloss. ad Verbum *Eschaeta*.

(w) Tho' the Lord *Verulam* (in his Treatise of the Use of the Law, p. 34) calls them *Royal Escheats*.

(x) the Statute 25 *Edward III. Cap. 2.* plainly makes this Distinction between *Escheats* and *Forfeitures*, declaring, that in the Cases of *High Treason*, the *Forfeiture of Escheats* pertaineth to the King, as well of the Lands and Tenements holden of others, as of himself; and that in Cases of *Petit Treason*, the *Escheats* ought to pertain to every Lord of his own *Fee*.—So that in the Clause relating to *Forfeitures* for *High Treason*, *Escheats* and *Forfeitures* are plainly distinguished; inasmuch as

Escheats

118 *An Introduction to the*

the King by the Common Law (y), and do not depend upon the Law of FEUDS or *Tenures* (z), but upon *Saxon Laws*

Escheats themselves are for such Treasons declared to be forfeited——And the Lord Coke (2 *Inst.* 64.) observes this Difference between them, saying, that where a Lord is attainted of *High Treason*, there the King hath the Land by *Forfeiture*, of whomsoever the Land is held, and not in respect of any *Escheat*, by Reason of any *Seignior*y. *Vid. Bro. Tit. Eschete*, 14 *Mo.* 160.——Upon this Difference we may easily account for *Gavel-kind* Lands being forfeitable for *Treason*, though they do not *escheat* for *Felony*; for though the Lord may connive at or dispense with all the *Causes of Escheat*, (*poteſt Dominus feloniam remittere. Zafius in uſus feud. Cap. 10. fol. 95.*) or might remit the *Escheat* itself as a Perquisite of *Tenure*; yet he could not dispense with the publick *Laws of Forfeiture*, or with Offences against any other Person than himself.

(y) *Hale Anal.* 110.

(z) For according to *Zafius*, by the Feudal Law, *Si Subvaſallus majorem Dominum, i. e. eum, cujus eſt feudum ratione directi Dominii, offendat, eo caſu quo Offenſionis Crimen privationem inducit, Feudum non ad Dominum offeſum, ſed ad Vaſallum qui ſubfeudarat revertitur.——Si Vaſallus ea ſpecie deliquerit, quod bona ſua publicanda vel Conſiſcanda venirent, tunc ſecundum Seniores Opinionem Feudum non Conſiſcabitur. Zafius in uſus feud. Cap. 10. fol. 92—100.*

By the Custom of *Normandy* indeed all *Forfeitures* for *Treason* were given to the Duke, but not ſo abſolutely as they are given to the King by the Common Law of *England*; for though by the Custom of *Normandy*, if a Man was attainted of *High Treason*, the Duke ſhould have all his Poſſeſſions. *Cuſtom. de Norm. Cap. 14. fol. 23. a.* Yet ſe l'homme a heritaige tenu d'aultres Seigneurs le Roy doit bailler hommes au Seigneurs da qui les heritaiges ſont tenuz quils ſacent leurs debvoirs
Seigneu-

Law of Tenures. 119

Laws (a), that were made long before the Introduction of *Tenures*, and which prevail even to this Day: and though they may seem severe upon the mesne Lord in defeating his *Seignior*y; yet as he had failed of that Caution and Regard, that was due to the Publick in the Choice of his Tenant, he was not altogether blameless (b), nor was he therefore deprived without Reason. And it is farther observable, that the Law hath inflicted a Penalty somewhat of the like Kind upon the mesne Lord, even where the Tenant is guilty of *Felony* only: for though the Land escheats, as by the Feudal Law it

Seigneuriaux, & payent les Rents de leurs Fiefs. Le Stille de proceder en Norm. 76.

(a) By the Laws of *Alfred* and *Canutus*, a Traitor should forfeit Life, Lands and Goods———*Qui Capiti & saluti Regis perfidiose sive solus, sive servus aut Sicariis mercede conductis stipatus Insidiabitur, vita & fortunis ejus (vita & Rebus suis) omnibus privator (pleñitor.)* LL. Alvredi Cap. 4. LL. Canuti Cap. 54. apud Lambard, de priscis Angl. Leg. Vid. Saltern. de Antiq. Brit. Leg, Cap. 10.

(b) For Lords were anciently in many Respects answerable for the Misbehaviour of their Tenants. *Vid. LL. H. I. Cap. 8. 41, 59, 86. apud Lambard. & inf. 146.*

120 *An Introduction to the*

ought, to the immediate Lord; yet, as the Crime affects the publick Peace, and the Lord may be supposed, for want of due Care in the Choice of his Tenant, to be in some Measure blameable, the King shall have the Land a Year and Day (c) to the Prejudice of the Lord.

Having thus far treated of the Fruits incident to, or arising from *Tenure*, I shall now suggest something concerning *Escuage*, which the Lord *Hale* (d) reckons among the Perquisites of *Tenure*, and, although I do not take it to have been of the Nature of a Perquisite, yet I shall follow him so far as to consider it in this

(c) Vid. Magna Charta Cap. 22. 2 Inf. 36, 37. Stat. de Prærog. Regis 17 Edw. II. Cap. 16. Staundford's Pleas of the Crown. Lib. 3. Cap. 30.

This is agreeable to the Customier of *Normandy*, Cap. 24. fol. 36. b. where it is said, that *Le Duc de Normandie aura ung an les terres aux damnez & les yssues: Et apres doibuent estre rendres a ceulx qui ils en avoient fait Hommage, & de qui ilz tiennent nu a nu*—
And in *le Stille de proceder en Normandie*, fol. 76. it is said *se l'homme est condamne par la Justice du Roy, Le Roy doibt avoir la premiere annee de la revenue des Heritaiges au condamné.*

(d) Anal. 54.

Place;

Place; the rather, because it seems to be one of the most obscure and unintelligible Branches of *Tenure*.

It is observable, that the *Author* of the *old Tenures*, and *Littleton* do both of them, in the Order and Disposition of their several Treatises of *Tenure*, consider *Escuage* and *Knight-Service* as several Services, and under distinct Titles; and that *Littleton* doth notwithstanding confound and blend them together in such a Manner, that it is difficult to collect from him any real Difference or Distinction between them: and yet we cannot reasonably imagine that they could be thus distinguished in Point of Title, if they were meer Synonymies, and there was no other Difference between them, than in Point of Sound. It must indeed be confessed, that none of our Law-writers have so clearly distinguished them, as might be wished or expected: and yet, if we consider *Escuage* as we ought, either 1. as a *Service*,
or

122 *An Introduction to the*

or 2. as a *Fine* or *Commutation* for Service, there will appear to have been a very considerable Difference between them.

1. It is plain that *Escuage* was a Service; for according to the old *Tenures* (e), *Tenir per Escuage*, (that is to say by the Service of *Escuage*) *est tenir per service de Chivaler*—And according to *Littleton* (f) *tiel Tenant que tient sa terre per Escuage tient per Service de Chivaler* (g), but *Escuage* was not

(e) Tit. *Tenir per Escuage*.

(f) Sect. 95.

(g) We are not necessarily to understand these Authors as if they meant that a Tenant by *Escuage* was a direct Tenant by *Knight-Service*, and held by the personal Service of a Knight, or Military Tenant; or that they really mean more than that a Tenant by *Escuage* was esteemed as a Knight, and that the *Tenure* itself was, on Account of its Subserviency to the military Policy of the Nation, respected as a military *Tenure*, or *Tenure* by *Knight-Service*: This was *Fleta's* Sense of *Escuage*, who says (*Lib. 3. Cap. 14. Sect. 7. fol. 198.*) that *Scutagium* — *ratione Scuti pro feodo militari reputatur* — & *feodum dici debet militare*. This Construction of *Littleton's* Description of *Escuage* is agreeable to the most obvious Construction of the like Description of *Grand Serjeanty*, viz. *touts que teignent de Roy per grand Serjeanty, teignent de Roy per Service de Chivalrie, &c.* (*Lit. Sect. 158.*) And yet the Service of a Tenant by *Grand Serjeanty* was not necessarily Military, but might

not (as *Littleton* intimates (h)) a direct personal Service of Attendance upon the King in his Wars, nor was it due upon all military Occasions, as *Knight-Service* was, but it was a *pecuniary* Aid or Contribution reserved (i) by particular Lords, instead, or in lieu,

as well be a meer Service of *Honour* to be done in Time of *Peace*, (*Lit. Sect. 153.*) nor was such Tenant liable to all the Consequences of *Knight-Service*, inasmuch as he was not bound to pay *Aid*, (2 *Inf. 233.*) or *Escuage*, (*Lit. Sect. 158. 1 Inf. 105. b.*) because his Service was to be done, says *Littleton*, (*Sect. 153*) *en son proper person*, and notwithstanding all this, he was said to hold by *Knight-Service*, that is to say, by as high a Service, and of the same Account as *Knight-Service*; but a Tenant by *Knight-Service* properly speaking he was not; for if he had, he could not have been exempted from *Aid* by any Construction of the Stat. *Westm. 1. Cap. 36.* nor could he have been deprived of the Benefit of *Magna Charta Cap. 2.* which restrained the *Relief* of all Tenants by *Knight-Service* to a fourth Part of a Year's Value: Whereas the *Relief* of a Tenant by *Grand Serjeanty* was always a whole Year's Value of the Land at least. *Lit. Sect. 154. 2 Inf. 10.*

(h) *Sect. 95, 96.*

(i) That *Escuage*, considered as a Service, was a reserved pecuniary Service, may be collected from *Bracton*, who calls it *Servitium forinsecum, quamvis sit in Charta de Feoffamentis expressum, & nominatum*——& *persolvitur ratione tenementorum non Personarum.* *Bract. Lib. 2. Cap. 16. fol. 36. a.* And that it was a reserved Service may likewise be collected from *Littleton*, who says that they, who hold by *grand Serjeanty*, hold by Service of Chivalry——But that the King should not have

124 *An Introduction to the*

lieu, of personal Service, the better to enable them to bear the extraordinary Expence of their own Attendance and Warfare, when, and as often as, the King should make War upon *Scotland* or *Wales*, or upon any other Foreign Country, if the *Tenure* was so *expressed* (k): But as the Quality and Quantity of the Lord's Ser-

have Escuage, *Sils ne teignent de luy per Escuage*, that is to say, unless Escuage was expressly reserved. *Lit. Sect.* 158. *Vid. Mad. Hist. of the Excheq.* 452.——

And what mightily confirms this Notion of *Escuage* is that *Escuage* in this View answers the *Norman Aide d'lost* mentioned in the *Custumier*, viz. *Len doit Scavoir que il ya aucuns fiefs de Hautbert qui doibuent a leur Seigneur le Service de l'ost, que doit estre fait a Prince, les autres doibuent l'Aide de l'ost, ceulx qui doibuent le Service sont tenus a le faire en l'ost: Ou envoyer persone pour ceulx qui le face avenaument, Ceulx qui doibuent l'Aide nen doibuent point rendre ne la lever, devant que le Prince leur ait ottoie la Quantite de l'Aide du fief.* *Custum. de Norm. Cap.* 44. fol. 66. b. *Terrien Com. du Droit civil de Duche de Norm. Liv.* 3. *Cap.* 10. fol. 109.

(k) According to the Book of *Tenures* *Tit. Escuage*—— *Escuage est proprement pour susteiner le guerre perenter Engleterre & ceux de Escose, au de Galeys: Et non pas perenter auters terres, pur ceo que les avandits terres ferront de droit appendant a la Royalme d'Engleterre.* *Littleton* indeed (*Sect.* 95, 97, 100, 101, 102.) mentions only *Scotland*; but the Lord *Coke* says, that *Scotland* is put but for an Example; for that if the *Tenure*, (i. e. the Service reserved) be in *Walliam*, *Hiberniam*, *Vasconiam*, *Pictaviam*, &c. it is all one. *Lit. Sect.* 155. *Vid. Selden Notes ad Hengham* 113.

vice

Law of Tenures. 125

vice abroad was occasional and uncertain, the *Quantum* of this *Aid* was seldom fixed and ascertained by the Reservation, but was usually reserved in some Proportion (l) to the Fine or Satisfaction, that the King should from Time to Time receive for and in lieu of the actual Service of such of his Tenants in *Capite*, as failed him in these Expeditions (m). This Aid and Fine were both of them called *Efcuage a Scuto*, *Quod assumitur* (says *Bracton*) (n) *ad Servitium militare*,
viz.

(l) Vid. Lit. Sect. 98, 100.

(m) *Exprimitur quandoque sic faciendo inde mihi & hæredibus meis ad Scutagium cum Evenerit, quantum pertinet ad feodum unius Militis.* Fleta Lib. 3. fol. 198. Vid. Bract. Lib. 2. Cap. 16. fol. 36. a.

(n) *Efcuage* or *Scutage* was not so called, because it was properly speaking *Servitium Scuti*: But it was *Servitium a Scuto dictum* (Somn. Gloss. ad X. Script.) *quia pertinens ad Scutum*, (Bract. Lib. 2. Cap. 16. fol. 36. a. Fleta Lib. 3. fol. 198.) & *quia Nomine Scutorum Solvitur.* Gervas. de Tilbur. Dial. de Scacc. apud Mad. fol. 25.

It may here be noted that Sir Henry Spelman (*Treat. of Feuds*, fol. 36, 37.) says that the Word *Scutagium*, and that of *Efcuage*, was of such Novelty, that it was not to be found among the Feudists, no, not among the French or Normans themselves: And yet that Fines or Satisfaction for Defect of Service were frequent, and established in many Countries, under the Names of *Hosten-*
ditia

126 *An Introduction to the*

viz. the one in respect of the *Scutum*, which the Lord actually bore; and the other in Respect of the *Scutum*, which every such Tenant ought to have bore to the Wars.

Supposing *Escuage*, as above, to have been a pecuniary Service, it is not likely, that *Knight-Service* was, as the Lord *Coke* imagines (o), incident to *Escuage*, or that *Escuage* was, as Mr. *Madox* supposes (p), incident to *Knight-Service*: *Escuage* being in this View a specifick Service of a

ditiae & *Heribannus*, appears from the Book of Feuds. *Lib. 2. Tit. 40, 54, 55. Schilt. Cod. Juris Alaman. Cap. 8. 87. Com. ad Cap. 8. Sect. 16. Stry. Examen. jur. Feud. Cap. 18. 2. 26, 30. Zasius in usus Feud. fol. 41. Lindenb. Cod. Leg. Antiq. Int. Leg. Longobard. Lib. 1. Tit. 14. Lib. 3. Tit. 6. & Gloss. adinde verbo Heribannus.*

Having observed thus much concerning the Word *Scutagium*, as it relates to *Tenure* only, it may not be improper to note farther (from Mr. *Madox*) that the Word *Scutagium* was likewise anciently used in a more extensive Sense, to signify any Payment assessed upon *Knights Fees*, whether such Payment was for the King's Army or not; thus the *Aid* arising out of *Knights Fees*, for ransoming King *Richard I.* is called *Scutagium ad Redemptionem Regis*, and other *Aids* set upon *Knights Fees* were also for some Time called *Scutagia*. *Vid. Mad. Hist. of the Excheq. 410. 431.*

(o) 1 *Inf. 69. a.*

(p) *Hist. of the Excheq. 432. in Marg.*

diffic-

different Kind, in respect whereof the Tenant, on Account of its Subserviency to the military Policy of the Nation, was only esteemed as a *Knight*, or military Tenant: And it is no Objection to this Notion of *Escuage*, that *Littleton* hath not hinted it, because it might in his Time be confounded and lost in the more general Notion of *Escuage*, considered as a *Fine* or *Commutation* for Service, to which all Tenants by Knight-Service were liable, if they did not by themselves, or by some other Person, discharge the Duties of their Tenure: for,

2. Though *Escuage*, considered as a *Species* of *Tenure*, might be of the Nature already suggested; yet it must be allowed, that it was anciently, as well as at this Day, more generally understood to denote a *Mulct* or *Fine* for a military Tenant's Defect of Service (q), and that, though it was

(q) Vid. *Mad. Hist. of the Excheq.* 438, 439, 454, 457, 458, 462.

128 *An Introduction to the*

not from the Time of King *John*, whatsoever it was before, arbitrary and at the Will of the Lord, but was to be fixed and assessed by Parliament (r), It was nevertheless assessed as a *Fine* or Satisfaction to be answered by such Persons only, as did not attend to the Duties of their Tenure (f): for though it is very certain, that

(r) *Roll. Tit. Escuage d'estre assesse per Parliament*, says that King *John*, en un Charter ordain en cest manner. 2 Ro. Ab. 509. S. 1. Vid. Infr. 133.

(f) And therefore if the Lord distrained his Tenant for Escuage, it was in *Littleton's* Time a good Plea to say, that he was with the King in his Wars. *Lit. Sect.* 102.

There is a remarkable Passage in *Mat. Paris* (fol. 372.) importing that a Fine or Commutation, called by him *Auxilium*, was after the Charter of King *John* to be assessed *de jure*, for *Defect* of Service, and not otherwise. The whole Passage is worthy the Reader's Notice, and therefore I have transcribed it, viz. *Convenerant eo tempore, (Anno scil't 1232. Nonas Martii) ad Colloquium apud Westmonasterium ad Vocationem Regis, Magnates Angliæ tam Laici quam Prælati, quibus Rex proposuit quod magnis esset Debitis implicatus causa bellicæ Expeditionis, quam nuper egerat in partibus transmarinis, unde necessitate compulsus ab omni generaliter Auxilium postulavit: Quo audito Comes Cestriæ Ranulphus pro Magnatibus Regni loquens respondit, Quod Comites Barones ac Milites qui de eo tenebant in Capite cum ipso erant ibi corporaliter præsentis, & pecuniam suam ita inaniter Effuderunt, quod inde Pauperes omnes recesserant, unde Regi de Jure Auxilium non debebant. Et sic petita*

Law of Tenures. 129

that all Tenants by *Knight-Service* were originally bound in all Events, either by themselves, or by some other Person, actually to do the Services of their *Tenure*; yet, if such Tenant did neither do them himself, nor provide another Person to do them, the Lord might accept a pecuniary Satisfaction, and choose whether he would take Advantage of the Forfeiture or not (t): but then the

K

Te-

petita Licentia Laici omnes recesserunt. Prælati vero Regi respondentes dixerunt, Quod Episcopi multi & Abbates, qui vocati erant, non fuerunt præsentēs, & sic petierunt Inducias quousque ad Diem certum possent omnes pariter convenire: Præfixus est itaque Dies a Quindecim diebus post Pascha, ut omnibus congregatis, tunc fieret quod erat de Jure faciendum.

(t) That Non-performance of the feudal Duties was a Forfeiture of a Feud appears above, p. 43. and that it was likewise anciently a Forfeiture of Tenure appears from the Leiger-Book of *Abingdon* cited by Mr. *Selden* in his Notes upon *Hengham*, p. 114, 115. viz. *Est juxta Abendune Burgum unius Militis Mansio quæ Lea vocatur: Hanc Willielmus Regis Camerarius de Londonia tenebat.* This *William* held it of the *Abbey*, and by *Knight-Service*: In 2 *Hen. I.* Forces were levied to encounter *Robert Duke of Normandy*, when *Faritius Abbot of Abingdon* required of *William* his Tenant to find him a Man for the Army, as his Tenure bound him to do, but *William* denied it, whereby the Abbot was driven by other Means to supply the Number of his Part.

The

130 *An Introduction to the*

Tenant was at the Mercy of the Lord, and such Satisfaction was to be made, as the Lord thought sufficient: But as the feudal Severities abated, and Lords grew indifferent, whether they were served by their own Tenants, or by others, such Forfeitures were easily dispensed with; and pecuniary Compensations, such possibly as might barely enable the Lords to hire others to do the Services of their *Tenures*, were commonly accepted; infomuch that, as such Compensations became frequent, and at length usual, most Tenants grew careless of their Services, and chose rather by these Means to satisfy their Lords, than to do their Services in Person, or be at the Trouble to provide another to do them: Our Kings anci-

The Abbot afterwards *tamdiu* (as the Book saith) in *Præsentia Sapientum* hanc rem ventilari fecit, ut Ille neutrum negaret, imo fateri sic esse vera ratione cogere-tur. Unde cum Lege patriæ decretum processisset ipsum exortem terræ merito debere fieri, Interpellatione bono-rum qui intercrant Virorum reddidit terram illam illi. And so the Tenant (says Mr. Selden) under fair Conditions had his Land again,

ently

ently (u) taking Advantage of, or perhaps complying with, this Humour of their Tenants, which had made their actual Service doubtful and precarious, did sometimes upon Occasions of War, without Summons or other Ceremony, assess a moderate Sum upon each *Knight's Fee*, as a *Scutage* or *Escuage*, by means whereof they might be enabled in all Events to provide Soldiers or Stipendiaries, to do the Services of their Tenants (w), who, as Equivalents had prevailed, could not be securely depended upon: But as *Escuage* of this Sort was a *previous* Commutation or Equivalent for Service, really *imposed* at the King's Will, and not

(u) Henry II. is thought to have taken the first Scutage. *Mad. Hist. of the Excheq.* 435. *Spelm. Gloss. ad verbum Scutagium.*

(w) *Fit interdum ut imminente vel Insurgente in regnum hostium machinatione decernat Rex de singulis feodis Militum summam aliquam solvi, Marcam (scilicet) vel Libram unam, unde Militibus stipendia vel Donativa succedant. Mavult enim Princeps stipendiarios quam Domesticos bellicis apponere casibus. Hæc itaque summa, quia nomine Scutorum Solvitur, Scutagium nuncupatur. Gervas. de Tilb. de Scacc. apud Mad. fol. 25.*

132 *An Introduction to the*

incurred as a Fine or Compensation by any Default or Neglect of the Tenant, it was not long submitted to: for, though the King, possibly until the Charter of King *John*, might have a Right to fix the *Fines*, which *particular* Tenants voluntarily incurred or compounded for; yet it was not reasonable that he should at his Pleasure demand a *general* Commutation, that his Tenants should in all Events submit to: But on the contrary, if he would rather have a general *Escuage* or Commutation, than the personal Service of his Tenants, it was highly reasonable, that his Tenants should agree to it, and in *Parliament* assess the Sum, that it might not exceed the Value of their Service, or the occasion of the Demand: This was thought so reasonable, that, in the Time of King *John*, it was not only insisted upon as an undoubted Right of the King's Tenants; but, because every *Scutage* or *Escuage*, even for particular

cular defects of Service did, in his Time, concern so great a number of the subjects of the realm, the *Barons* urged, and the King by his Charter declared, that no *Escuage* should be imposed or assessed, *nisi per commune Concilium regni* (x) This or a like Declaration, as to the manner of imposing or assessing *Escuage*, is not to be found in the Charter of his successor *Henry III*, but still it operated as a Declaration of the common Law (y), consistent with the Charter of *Henry III*, which declares, that *Escuage* should from thenceforth be taken, as it had been usually taken in the time of *Henry II*. (z)

(x) *Nullum Scutagium—ponatur in regno nostro nisi per commune Concilium regni nostri.* Carta Reg. Johannis.

(y) Albeit *Escuage* incertain be due by *Tenure*, yet because the Assessment thereof concerned so many, and so great a Number of the Subjects of the Realm, it could not be assessed by the King, or by any other, but by the Parliament; and this was (says the Lord *Coke* by the Common Law, 1 *Inf.* 72. a. but *Littleton*, who never went beyond himself, speaks more doubtfully of the Matter. *Lit. Sect.* 97.

(z) *Scutagium de cætero capiatur sicut capi tempore Regis Henrici avi nostri consuevit.* Mag. Carta Hen. III. c. 37.

135 *An Introduction to the*

Escuage being now the only Penalty for defect of Service, many Lords by Agreement between them and their Tenants fixed this uncertain *Escuage* to a certain Sum, that should be paid, as often as *Escuage* should be granted, without Regard to the Rate that should be fixed or assessed by Parliament: *Escuage* thus ascertained was called *Escuage certain*, and because it did in Effect discharge the Tenant from all military Service, the Persons, who held by such *Escuage*, were looked upon as *Socage* Tenants, and were no longer esteemed as Tenants by *Knight Service* (a).

(a) Lit. Sect. 98, 120. 1 Inf. 87. a.

CHAP. III.

HAVING thus imperfectly set forth the Nature of FEUDS, and shewn how *Tenures*, and the Consequents of *Tenure* were probably established in *England*; I shall now endeavour to shew, that, though our Doctrine of *Tenures* may not exactly tally with any particular System of FEUDS, they are nevertheless of a feudal Nature, as well as Original: for though there may be many Particularities in our Law of *Tenures*, that can hardly be accounted for upon strict Feudal Principles; yet they will in no Degree affect the Truth of this Proposition, if it be considered, that the Feudal Policy did not at once prevail in the several Parts of *Europe*, by a conquering power, or in a legislative uniform Manner, but that it obtaining as a mere Policy, and as such, gradually spreading itself over

K 4

the

137 *An Introduction to the*

the Western Parts of the World (a), was variously received, every Nation so modelling it, as to preserve its principal Aim, and at the same Time to make it conform as far as possible with the Notions of Government and Conditions of Property entertained and established in each Country (b), antecedent to its Reception of such Policy.

To come therefore to the Business of this Chapter, it is to be observed, that it is so absolute a Maxim, Principle, or Fiction of the Law of *Tenures*, that all the Lands in *England* are holden either mediately or immediately

(a) *Jus hoc feudorum non simul nec uno Tempore Gentibus Europeis illuxit, sed his serius, illis citius, sensimque adolevit, & radices undiquaque cœpit agere.* Crag. de Jur. feud. 29.

Quæ (feuda scil't) ab iisdem Longobardis jam olim Moribus erant recepta, eadem apud plerosque Gentes alias ita invaluerunt ut partem apud singulas Juris civilis faciant. Grot. Prol. Hist. Goth. 64.

(b) *Jus feudale est locale, ejusque partes ut quæq; sibi commodior videbatur, Gentes Europæ ad se traduxerunt & Observationibus diversis quasi Emollierunt.* Crag. de Jur. feud. 217. *Dubium non est Gentes diversas recipiendo pœdetentim feuda, Jura quoque specialia sibi circa eadem Constituisse.* Stryk. Exam. Jur. Feud. Cap. 1. Q. 5.

of

Law of Tenures. 138

of the King (c), that even the King himself cannot give Lands in so absolute and unconditional Manner, as to set them free from *Tenure*: And therefore, if the King should grant Lands without reserving any particular *Service* or *Tenure*, or if he should in exprefs Words declare, that his Patentee should have such and such Lands *absque aliquo inde reddendo*; yet the Law or established Policy of the Kingdom would create a *Tenure*, and his Patentee should anciently (before the Stat. 12 Car. 2. Cap. 24.) have held of him in *Capite* by *Knight-Service* (d): for as a *Tenure* was necessary, and the *Tenure* in such Case

(c) Thus according to the Lord *Coke*, all the Lands and Tenements in *England* in the Hands of Subjects are holden mediately or immediately of the King: For in the Law of *England* we have not properly *Alodium* that is, any Subject's Land that is not holden. 1 *Inf.* 1, 65. 2 *Inf.* 501. *Somn. Treat. of Gav.* 126.

(d) Of such Necessity is the Reservation of a *Tenure* — that altho' the King should grant Land without any Reservation of *Tenure*, or by exprefs Words *absque aliquo inde reddendo*, yet the Law would create a *Tenure* in *Capite* (Case of *Tenures* upon the *Irish* Com. of defective Tit. 196.) by *Knight-Service*. 6 *Rep.* 6. 9 *Rep.* 123. *Vid. Bro. Tit. Tenures*, 3, 52.

un-

139 *An Introduction to the*

uncertain, the Law created such a *Tenure* as was most agreeable to the Policy and Design of *Tenure*, and such as came nearest to the Nature of a *proper* FEUD, upon the Feudal Presumption, that every FEUD was a *proper* FEUD (e), that did not appear *ex verbis investituræ* to be otherwise (f): besides, a *Tenure* of some sort or other is so necessary, that it cannot be released: and therefore if the King release the Services to his Tenant, it will not extinguish the *Tenure*; but the Tenant shall notwithstanding hold by *Fealty*, which is (says the Lord Coke), an incident inseparable, (*i. e.* essential) to every *Tenure* (g), and which cannot therefore be released (h).

(e) Vid. Sup. p. 36.

(f) Thus in *Scotland* all Lands are presumed to hold *Ward*, except another *Holding* be expressed, & *servitium debitum & Consuetum* is interpreted to be *Wardholding*, which is the properest Holding, and in the *Scotch* Division of *Holding* answers to our *Tenure* by *Knight-Service*. Vid. *Sir Geo. Mackenzie's Inf.* 107, 108.

(g) 9 Rep. 123. Case of Tenures, &c. 196.

(h) *Fidelitas remitti non potest*. Zafius in usus Feud. 122. Vid. sup. p. 35.

This

Law of Tenures. 140

This Fundamental Principle, that all the Lands in *England* are holden, is singly a Proof, that our Lands thus held are either FEUDS, or of a Nature very like them; since (as Mr. *Selden* says) *veluti Beneficia seu Feuda clientelam alicujus Domini merito ac planissime aut Agnoscant aut Agnoscere debeant* (i).

Lands thus held we call *Tenures* (k), which are principally and generally divided according to their Services, (whether Military or Predial, certain or uncertain) into *Tenures* by *Knight-Service*, and in *Socage*.

I. *Tenures* by *Knight-Service* differed very little from *proper* FEUDS; for they were purely Military, and genuine Effects of the Feudal Establishment in *England*. The Services were occasional, tho' not altogether uncertain, as in *proper* FEUDS (l); they be-

(i) Seld. Notes ad Eadmer. 203.

(k) *Tenure est la maniere par quoy les tenements sont tenus des Seigneurs.* Custom. de Norm. Cap. 28. fol. 47. b.

(l) Vid. sup. p. 28,

141 *An Introduction to the*

ing with us restrained, as in *Normandy*, to 40 Days (m). But the *Tenure* itself was in most other Respects to be considered as a *proper FEUD*: for it was created by pure Words of Donation (n), was transferred by *Livery* or *Investiture*, and perfected by *Homage* or *Fealty* (o): It was subject to *Relief*, *Aid*, and *Escheat*, to *Wardship* and *Marriage*, and to almost all the Conditions and Restrictions of a pure *Original FEUD*.

These *Tenures* by *Knight-Service* are now abolished by the Stat. 12 Car. 2. Cap. 24. and turned into *common Socage*; so that I shall not distinctly consider the several Properties Kinds and Diversities of *Tenure* treat-

(m) Vid. Consuetud. Norman. Tit. de Exercitu Ducis, Cap. 25. & Lit. Sect. 95.

(n) Vid. 1 Inf. 9. a.

(o) Whatsoever Difference there was anciently in our Law between Homage and Fealty, (*Vid. Sup. p. 55, 67. in Marg.*) they are now so blended together, that they are in Effect with us, as in other Countries, but one and the same Engagement. *Vid. Le Stat. de Homagio 17 Edw. II. Lit. Sect. 85. Crag. de jure Feud. 222. Custum. de Norm. Cap. 29. fol. 48. b. Bacon Hist. of Eng. Gov. 200, 201.*

Law of Tenures. 142

ed of by our *English* Lawyers under this Head, but shall barely inquire, how far our *Tenures* in *Socage* may be supposed, even at this Day, to retain the Nature of FEUDS.

II. *Tenures* in *Socage* (p) are *Holdings* by any certain conventional Services, that are not Military (q), the Word *Socage* being according to Mr. *Somner* (r), derived of the *Saxon* Word *Soc*, which imported a Liberty, Privilege or Immunity, and *AGIUM*, which was, according to the Lord *Coke* (s), a legal Termination importing Service or Duty.

The Privilege or Immunity (says Mr. *Somner*) imported by *Soc* consisted in a Freedom from all military and uncertain Services, whereunto *AGIUM* being added, which

(p) *Socage* (says Mr. *Somner*) is a Term as old as *Domesday-Book*, tho' it first occurs in *Glanvil*, and be not used in any elder Record. *Treat. of Gav.* 143.

(q) *Tenure en Socage est lou le tenant tient de son Seigneur son Tenement per certain Service pur tous maners de services issintque les Services ne sont pas Services de Chivalry.* Lit. Sect. 117.

(r) *Treat. of Gav.* 133, 141.

(s) 1 Inst. 86. a.

signi-

143 *An Introduction to the*

signified the *Agenda*, the Service or Duty to be returned for that Privilege, it comes forth *Socagium* in *Latin*, *Socage* in *English*; and he thinks that this Term cannot, according to the Opinion of our common Lawyers, (t) be derived from the Word *Soca*, and so be understood to import *SERVITIUM SOCÆ*, that Sense being (as he says) too narrow to take in all the Services of the several Estates, that are held by *Socage Tenure*: But as *Littleton* (u) obviates this Objection by declaring that this *Tenure*, which had its Denomination from its most ancient and usual Service, may well retain the same Name, notwithstanding the Service of the Plough be now changed into many other Kinds of Service; I must confess, that, tho' the Conjecture of Mr. *Somner* be very Ingenious, and though *Britton's* Description of *Socage Te-*

(t) Vid. Litt. Sect. 119. Fleta L. 3. Cap. 16. Sect. 3.

(u) Sect. 119. Vid. 1 Inf. 86. b. Crag. de Jur. Feud. 65.

nure (w) seems to countenance it; yet I am inclined to prefer the general Opinion of our common Lawyers, i. Because our Division of *Tenures* into *Knight-Service* and *Socage*, considering *Socage* as a *Tenure per Servitium Socæ*, directly answers the *Norman* Division of *Tenures* into *Fiefs de Haubert* (x) and *Fiefs de Roturiere*, that is

(w) *Sokemanries fount Terres & Tenements, que nē fount mye tenus par Fee de Chivaller ne par graunds Serjaunties, ne par petits, mes par simples Services, sicomie Terres Enfranches par nous ou par nos predeceffours d'nos aunciennes Demeynes.* Brit. cap. 66. Sect. 438.

(x) Hence a Tenant by Knight-Service is described in the old Custom of *Kent*, as one qui tiene per fee de *Hawberke*. Lamb. Peramb. of *Kent* 646.

Mr. *Loyseau* gives a very rational Account of the Denomination of this *Fief*, which, because it shews in some Measure the Analogy between this and our *English* Knight's Fee, I shall give the Reader in his own Words, viz. *Les Seigneurs des Baronniez—se sont appelez Hauts Barons, ou hauts Bers; car il est bien certain que—Ber & Baron est mesme chose—Et Hautber & Hautbaron sont confondus comme Synonimes, & de là sans doute Originairement a estre dit le fief de Hautbert—Mais pour ce que le Haut Ber ou Seigneur de fief de Hautbert estoit tenu servir le Roy en guerre avec Armes pleins—& consequemment avec l'arme du Corps, qui estoit lors la cotte de Mailles, de là est venu que cest arme a este appelee Hauber ou Haubergeon, dont a succession de temps est advenu, que le fief de Hauber a este pris pour toute espee de fief, dont le Seigneur est tenu servir le Roy avec le Hauber ou Haubergeon.* *Loyseau Traite des Seigneuries* 156, 157. Vid. *Seld.* Notes on his Jan. 119.

145 *An Introduction to the*

according to Mr. *Somner's* own Translation, the *Gentleman's* and the *Husbandman's*, or *Ploughman's Fee* (y); and 2. Because in this Sense the *Tenure* in *Socage* is like the *Tenure* by *Knight-Service*, the other Branch of *Tenures*, simply denominated from the Name or Nature of the Service, anciently reserved upon such *Tenure*.

But be this as it will, all our *English Fees* or *Holdings*, whether they be *Frank* or *Emphiteuticary*, *Burgage* or *Gavelkind*, (though *Burgage* and *Gavelkind* have many Qualities different from *Common Socage*) do now fall under the Notion of *Socage Tenures*, which, though they vary in Point of Service, Succession, and the like, as improper *FEUDS* (z), do nevertheless retain the Nature of *FEUDS*: Inasmuch as they are held of some

(y) *Somn. Treat. of Gav.* 36, 49, 50. *Vid. Lamb. Peramb. of Kent*, 604.

(z) *Vid. Sup. p.* 32.

Law of Tenures. 146

Lord or Superior by *Fealty* (a), and usually by some other certain Service or Acknowledgment; and inasmuch as they yield or pay Relief (b), and may escheat.

(a) *Fealty* was as necessarily incident to every *Tenure*, as to every *Feud*, (*Vid. Sup. p. 35.*) and therefore if the King granted Lands *tenend' per Servitium unius rosæ solummodo pro omnibus & omnimodis aliis Servitiis*; yet *Fealty*, the Politick Bond of *Tenure*, tho' looked upon as a Service, should be supposed contrary to such Grant; (6 *Rep. 6, 7.*) for *Fealty* could not with us, more than by the Law of Feuds, be discharged or dispensed with, because it was the *Vinculum Commune*, or Cement of the whole feudal Policy; and, though it was sworn to the Lord, virtually extended to the whole Community; the Lord therefore was to see that his Feudatary did his *Fealty*, that is to say, that he contributed, according to his *Fealty*, or feudal Engagement, to the Maintenance and the Security of the Society, formed and united together by a Military or Feudal Policy. And this was anciently one of the main Articles of Inquiry in the *Lord's Court*, called at this Day a *Court-Baron*; in which the Lord was wont, not only to receive the *Fealty* of his Tenants, but to inquire of, and enforce the Observance of it; not merely as it respected his particular Interest, but as it tended to the Defence and Security of the Public. (*Vid. LL. Will. I. Cap. 59.*) And the Lord in Consequence of such *Fealty* done to him, and of the Power he had, and the Obligation he was under to enforce it, seems to have been anciently accountable to the Public for the Behaviour of his Tenant, (*Vid. Leg. Hen. I. Cap. 8, 41.*) until it was expressly declared by the 86th Law of Henry I. that he should not be accountable for the Misbehaviour of his Man or Tenant; *Si Homo suus misfaciat sine posse vel velle suo, maxime si nunquam deinceps ad eum redeat.*

(b) *Vid. Sup. p. 104. & ibid. in Marg.*

L

Our

147 *An Introduction to the*

Our Lawyers divide these Tenures, according to their Duration, or what they call the Quantity of Estate, into Estates in *Fee*, for *Life*, for *Years*, and at *Will*; but I shall divide them into Estates in *Fee* and for *Life* only, this Division being large enough for my Purpose.

I. Estates in *Fee* are either *Fees Simple*, or *Fees Tail*. A *Fee Simple*, tho' it be according to *Littleton*, *Hæreditas pura* (c), yet is not so called, because it imports an Estate purely *Alodial*, or free from all *Tenure*; but is so called in Opposition to *Fees Conditional* at Common Law, and *Fees Tail* since the Statute *Westm. 2. de Donis*; as importing a simple Inheritance clear of any Condition, Limitation, or Restriction (d) to any particular Heirs, and descendible to

(c) Lit. Sect. 1.

(d) Thus according to the Lord Coke (1 Inf. 1. b.) the Word *Simple* properly excludeth both Conditions and Limitations, that defeat or abridge the Fee. And according to *Fleta*, *Simplex Donatio & pura est, ubi nulla adjecta est Conditio neque Modus*. *Fleta* Lib. 3. Cap. 8.

the Heirs General, whether Male or Female, Lineal or Collateral: for it having been for many Ages a fixed and undeniable Principle or Fiction of the Law of *Tenures*, that all the Lands in *England* are holden, our *English* Lawyers very rarely (of late Years especially) use the Word *Fee* in Contradistinction to *Alodium*, to denote the *Tenure* and Quality of any Man's Estate; but generally use it *simply* to express the Continuance or Quantity of Estate: and this is clearly the Sense and Import of it in the Form of Pleading an Inheritance in the King, *viz.* *Rex seifitus fuit in Dominico suo ut de Feodo*, where the Word *Feodum* cannot possibly import a *Tenure* (e); Nor can it (as Sir *Henry Spelman* supposes (f), contrary to the original and proper Sense of the

(e) For the King cannot be said to be a Tenant, because a Tenant holdeth of some Superior, and the King hath no Superior but God. 1 *Inf.* 1. b. *Case of Tenures*, 193, 194.

(f) *Treat. of Feuds*, fol. 6.

149 *An Introduction to the*

Word) import *Directum Dominium* : but must be understood, without Regard to the *Dominium*, *Propriety* or *Tenure*, simply to denote an Inheritance (g).

Sir *Thomas Smith* (h), *Cowel* (i), and others therefore misapprehending the Sense, in which *Littleton* says, that *Feodum est Idem quod Hæreditas Legitima & pura*, charge him with a new and absurd Notion of a *Fee*; whereas if he be rightly understood, it is plain that he doth not use the Word *Fee* in an improper or barbarous, but in a partial Sense only : for since those *Dona* or *Beneficia*, which we now call *Feoda*, were not so called, 'till they became Hereditary (k), the Word *Feodum*, as a Term, imports not only *Beneficium*,

(g) *Fee*, in our legal Understanding (saith the Lord *Coke*, 1 *Inf.* 1. b.) signifieth, that the Land belongs to us, and our Heirs, in respect whereof the Owner is said to be *seised in Fee*, and in this Sense the *King* is said to be *seised in Fee*.

(h) *Smith de Rep. Ang.* 283, 284.

(i) *Cowel Int. ad Verbum Fee.*

(k) *Vid. Sup. p. 19.*

but

Law of Tenures. 150

but *Beneficium* & *Hæreditatem* (1), and is so to be understood in the *Formula* of Pleading a Subject's Title to an Inheritance in *Dominico suo ut de Feodo*, where the Word *Feodum* imports as well *Beneficium* as *Hæreditatem*: So that though, when FEUDS were fully established, and there remained no *Alodial* Property in *England*, *Littleton* used the Word *Fee* in a partial Sense only to denote the Quantity of Estate, and not the Quality or Conditions of Tenure; yet it is not to be imagined that he did it ignorantly; unless we can suppose that he knew nothing of the Ground of *Tenures*, or of those Authors who had gone before him, and had expressly noted, that *Feodum* did likewise

(1) *Aliqui Feudum duplici ratione acceptum produnt, alia scilicet, qua quis tenet immobile aliquid ex quacunque causa sibi & Hæredibus suis, alia, qua quis tenet ab alio per Redditum vel servitium vel utrumque.* Cow. Inf. L. 2. Tit. 2. Sect. 8.

151 *An Introduction to the*

import Lands holden of another by Service (m).

In conveying or conferring these *Fees* or Estates in Fee, though they are now, contrary to the Original Purity of *proper* FEUDS, become vendible, the ancient Form of Donation is still preserved; and a *Feoffment*, whether constituting or transferring a *Fief* or *Fee*, retains even at this Day the Form of a Gift (n): It is perfected and notified by the same Solemnity of Livery and Seisin, or Investiture, as a pure feudal Donation (o),

(m) Thus *Bracton*, who wrote long before *Littleton*, says, that *Feodum est id quod quis tenet ex quacunque causa sibi & hæredibus suis* — Item dicitur *Feodum alio modo ejus qui alium feoffat, & Quod quis tenet ab alio, ut si sit qui dicat talis tenet de me tot Feoda per Servitium militare*. *Bract. Lib. 4. fol. 236. b.* — *Fleta* (Lib. 5. Cap. 5. Sect. 27.) gives us, in *Bracton's* Words, the same double Sense of the Word *Feodum*, which is expressly agreed by the Lord *Coke*. 1 *Inf.* 1. b. 4 *Inf.* 202. and was well understood by *Littleton*, as appears from his frequent Mention of Knight's Fees, i. e. of Fees holden by Knight Service. *Vid. Lit. Sect. 95, 102, 112, 113, &c.*

(n) For *DO* is the aptest Word of Feoffment. 1 *Inf.* 9. a. whence a Feoffment is called *Donatio*. *Ibid.* & *Fleta, Lib. 3. Cap. 8.*

(o) *Vid. Fleta Lib. 3. Cap. 15. Sect. 4, 5. Bract. Lib. 2. Cap. 17. Sect. 1.*

and

Law of Tenures. 152

and is still directed and governed by the same Rules; insomuch that the Principal Rule, relating to the Extent and Effect of a feudal Donation, *Tenor est Observandus* (p), is in other Words become a Maxim of our Law relating to Feoffments, *Modus Legem dat Donationi*. In Feoffments too, as in pure feudal Donations, the Giver or Superior, from whom the *Fief* or *Fee* moves, must expressly limit and declare the Continuance or Quantity of the Estate he means to confer, or else the Feoffee or Donee shall have an Estate for Life only (q); for Feoffments are still so far to be considered as Gifts, that they are not to be extended beyond the express Limitation or manifest Intention of the Feoffor (r); and therefore as the *Personal* Abilities and Services of the

(p) Vid. Sup. p. 21.

(q) 1 Inf. 42. a. Crag. de jure feud. 53.

(r) *Feodum ex sua Natura est species quædam Donationis, & æquum est ut omnes Donationes sint stricti juris, ne Quis plus donasse præsumatur quam in Donatione expresserit.* Crag. de jur. feud. 50. Vid Sup. p. 16, 17.

153 *An Introduction to the*

Feoffee were originally supposed to be the immediate or principal inducements to the Feoffment, the Feoffee's Estate in the *Fee* should subsist no longer than his Life; unless the Feoffor, by an express Provision in the Creation or Constitution of the *Fee*, gave it a longer Continuance.

Feoffments had likewise anciently, (that is to say) before the Statute *Quia Emptores Terrarum*, almost all the Consequences of pure feudal Donations: for they, without any Words of Reservation, created a Tenure between the Feoffor and the Feoffee, and the Feoffor was, in Consequence of his own Gift (f), on Account of the Services he receiv'd, or was suppos'd to receive from his Feoffee, bound to warrant (t), and defend his Seisin or Possession; and if he could not maintain it, was obliged to make him Satisfac-

(f) Vid. Statut. de Bigamis, 4 Edw. I. Cap. 6. 1 Inf. 384. a. 4 Rep. 81.

(t) *Warrantizare nihil aliud est quam Possidentem defendere.* Fleta Lib. 5. Cap. 15. Bract. Lib. 3. Cap. 16. Sect. 10.

tion

Law of Tenures. 154

tion by rendering to the Value of the Fee, if it was evicted (u).

Although this might suffice to convince the Reader that our present *Tenures* are altogether Feudal, yet I shall consider some of the most ancient Qualities of *Tenure*, as that our Estates were not alienable, testamentary, and the like, and shall submit them as farther Evidences of the feudal Nature of *Tenure*.

1. It is very certain that our *Fees* or Estates could not at Common Law be aliened without the Licence and Consent of the Lord (w), and that

(u) Vid. Sup. p. 38, 39. Glanv. Lib. 9. Cap. 4.

(w) Vid. Spelm. Treat of Feuds. 21. Somn. Treat. of Gav. 8, 9. Bacon Hist. of the Eng. Gov. 274.

The true Reason is given by Plowden (*Arguendo Mo.* 172.) viz. *Quia les Confidences del Tenure (cest) le Homage, Fealty, Service, &c. fueront mutualment appropriate al Person del Roy & le Tenant per le Original done, issintque il ne puisseit estoyer ove reason de eux transferrer ou severer sans gree, &c.*

It is said indeed Bro. Tit. Alienation 10. that a Tenant holding even of the King poet *alyener devant An.* 20 H. III. *cy frankment sans lycence que auter Home poet* — But whether this Opinion be not grounded upon a mistaken Sense of *Magna Charta* Cap. 32. is left to the Reader, upon what is suggested in the Text concerning that Statute. *Inf.* 157, 158.

155 *An Introduction to the*

that this Restraint of Alienation was a feudal Quality of *Tenure* is hardly to be doubted (x), since it is not otherwise to be accounted for (y): But though Tenants in general could not *de jure* alien or transfer the *Tenure* itself, yet the Tenants of Common Lords might give *Part* of their Lands (z) to hold of themselves

The Lord Coke (1 *Inf.* 43. 2 *Inf.* 65, 66, 501.) supposes, that, tho' a Tenant could not at Common Law alien a *Part* to hold of the Lord, because the Lord's Seigniorship was intire, yet the Tenant might have made a Feoffment of the *Whole* to hold of the Lord, because there no Prejudice ensued, &c. but this Supposition is so contrary to the feudal Notions of Alienation, (*Sup.* p. 29.) and so inconsistent with any reasonable Construction of the Statute *Quia Emptores Terrarum*, that it is not to be credited. *Vid. Glanvil Lib. 17. Cap. 1. Bacon Hist. of Eng. Gov.*

374

(x) *Vid. Sup.* p. 29, 30.

(y) Especially if we may suppose the *Saxon Bocland* and *Thaneland* to have been alienable, as we are assured by Mr. Somner they were. *Vid. Somn. Treat. Gov.* 87, 88, 89. *Spel. Treat. of Fends* 21.

(z) *Potest quilibet Liber Homo terram habens Quandam partem terræ suæ cum filia sua, vel cum alia quilibet muliere, dare in Maritagium———Quilibet etiam cuicunque voluerit potest dare quandam partem sui liberi tenementi in remunerationem servitii sui, vel Loco religioso in Eleemosynam———Licet autem ita generaliter cuilibet de terra sua rationabilem partem pro sua voluntate cuicunque voluerit libere in vita sua donare, &c.* *Glanv. Lib. 7. Cap. 1.* But in all these Cases the Donee

selves (a), and did in Fact often dispose of the whole (b), by which,

held of the Donor. *Tenantur autem Hæredes Donatorum Donationes & res Donatas sicut rationabiliter factæ sunt, illis quibus factæ sunt & hæredibus suis Warrantizare.* Glanv. Lib. 7. Cap. 2.

(a) This Distinction between *Alienation* to hold of the next or superior Lord, and a *Gift* or *Feoffment* to hold of the Tenant himself, answers the feudal Distinction between *Alienation* and *Subinfeudation*: For though *Subinfeudation* (by which a new inferior Feud was carved out of the old, the old one still subsisting) was allowed by the feudal Law; yet *Alienation* (by which the original Feud itself was transferred, and a new Feudatary substituted in the Place of the old) was not. (*Vid. Feud. Lib. 2. Tit. 3. 26. Sect. 5. Tit. 34. Sect. 2, 3. Tit. 108. Crag. de jur. Feud. 343. Schilt. Com. ad Cod. jur. Aleman. Cap. 30. Stry. Exam. jur. Feud. Cap. 19. Quest. 23, 24. Zouch Descrip. jur. temp. 11, 12. Seld. Tit. of Hon. 572.*) The Alienation therefore here said to be unlawful must be understood of Alienation to hold of the superior Lord, as it is opposed to Subinfeudation, *i. e.* a Feoffment by the Tenant to hold of himself.

(b) That a Tenant might, in Henry II.'s Time, under some Circumstances, have given the whole Land, appears from Glanvil, (Lib. 7. Cap. 1. p. 46. a.) viz. *Si (is scil't qui terram suam donare voluerit) nullum Hæredem filium vel filiam ex corpore suo procreaverit, poterat ex quæstu suo cuicunque voluerit quandam partem donare sive totum quæstum (in vita sua) hæreditabiliter — Sin autem & Hæreditatem & Quæstum habuerit, tunc indistincte verum est quod poterit de quæstu suo quantamlibet partem sive totum cuicunque volueret donare ad remanentiam, de hæreditate vero sua nihilominus dare potest, secundum quod prædictum est, dum scil't rationabiliter hoc fecerit.*

Emptiones vel Deinceps Acquisitiones suas det, cui magis velit. Si Bocland habeat quam ei Parentes sui dederunt, non mittat eam extra Cognationem suam. LL. H. I. Cap. 70.

though

157 *An Introduction to the*

though they could not force a new Tenant upon the Lord (c), yet they put him to some Inconveniencies (d). This Practice (e) therefore was restrained by *Magna Charta, Cap. 32. Nullus Liber Homo det (f) de cætero*
am-

(c) Vid. Bacon Hist. of the Engl. Gov. 274.

(d) As Loss of *Wardship, Marriage, Escheat* and the like. See the Preamble to the Stat. Quia Emp. Terr. 18 Edw. I.

(e) That this was the Practice restrained by this Law appears from *Stanford*, who says that this Statute is but a Confirmation of the Common Law, as it doth appear by that (says he) that is written in *Glanvil*, (*Sup. p. 155. m. 156. m.*) for so one that held by *Knight-Service*, if he might have been suffered to alien the greatest Part of his Land, he would have aliened the same peradventure to hold of him but in *Socage*, or by some small Rent, and then having so little a Livelihood left to himself, how had he been then able to have done the Service of a Knight, or a Man of War? or what should his Lord have had in Ward to have found one to have done the Service? Surely little or nothing, whereby the Strength of the Realm might have much decayed: Therefore it was a reasonable Law to restrain him, as me seemeth, &c. *Stanf. de Prærog. Regis 28. a.*

The Author of the Mirror, I confess, takes the Restraining of this Law in another Sense, saying, that *Le Point de la grand Charter que defend que nul alien sa terre en prejudice del Seignior del fief est enterpretable en cest manner; Que nul tenant ne alien le fiew son Seignior sans son assent, ou a tenir en chief de Seignior sans encrease del novel service.* Mir. Cap. 5. Sect. 2. p. 316.

(f) The Word *DO*, as used in this Charter, in *Glanvil*, (*ut sup. p. 155. m.*) and, in all Feoffments between common Persons, was plainly, before the Stat. *Quia Emptores*
Ter-

amplius alicui quam ut de residuo terræ possit sufficienter fieri Domino Feodi servitium ei debitum (g). The Words *de cætero* do not (as I take it) suppose that the Tenant might before have lawfully aliened or *given* the *Whole* of his Land to hold of himself; because then this Chapter, prohibiting it for the Future, would have been a Restraint upon the Tenant's Liberty at Common Law: But they plainly suppose such *Gifts* or Alienations to have been unlawful, which are therefore restrained meerly in Confirmation of the Common Law. And it is observable that, though this Chapter of *Magna Charta* allows the Tenants of Common Lords the Liberty they claimed, of *giving* a reasonable *Part* of their Lands to hold of themselves; yet it

Terrarum, a Word of *Subinfeudation*; the Law before that Statute (without any Words of Reservation) creating a Tenure between the Donor and the Donee, or Feoffor and Feoffee, as now called.

(g) The Words *de residuo Terræ & feodi Servitium* plainly distinguish between the *Land* and the *Fee*; inasmuch as the *Residue* of the *Land* was to answer the Service of the *whole Fee*.

was

159 *An Introduction to the*

was not understood to allow the King's Tenants the like Liberty of giving or disposing any of their Lands to hold of themselves (h).

Hitherto

(h) The Lord Coke (2 *Inf.* 65) says, that the Tenant of a common Person might, before this Chapter of *Magna Charta*, have made a Feoffment of Parcel of his Tenancy, to hold of himself : But that it was doubted in the King's Case whether his Tenant might or no——— And if it was a Doubt before, it must remain so notwithstanding this Law, which is meerly restrictive, and not enabling : But when, or upon what Ground this Doubt or Difference was first made, he does not say, nor is it to be conceived ; since it is clear that *Subinfeudations* were warranted by the Feudal Law, (*ut sup.* p. 156. m.) and that they were an original and necessary Branch of the feudal Policy itself, (*Vid. Sup.* p. 7, 8.) and tho' some Modern Feudists seem to countenance this Difference ; (*Vid. Stry. exam. jur. feud. cap. 19. §. 26. Schilt. Com. ad Cod. jur. aleman. Cap. 49.*) yet it seems to be rather a *Local*, than a *general feudal* Distinction ; and therefore it is Matter of Inquiry, when it was first started in *England* : For though the Lord Coke says, that it was a Doubt before *Magna Charta* ; yet it is not to be imagined that it was always a Doubt, because the many subordinate Tenures and Manors subsisting at this Day, are so many Evidences that it was not : And that it was not doubted until the Time of *Henry III.* is highly probable from the Stat. 34 *Edw. III. Cap. 15.* which makes good all such Alienations made by People who held of the King's Great Grandfather, or of other Kings before him, expressly saving his Prerogative of the Time of his Grandfather, Father, and of his own Time.

This Saving of the King's Prerogative from the Time of *Henry III.* and not of the Times before him, must appear somewhat extraordinary, unless such Alienations were first questioned in his Time ; and if so, the

Saving

Law of Tenures. 160

Hitherto the Doctrine of Alienation, whether to hold of the Lord, or of the Tenant himself, seems to have been clearly Feudal ; and the first Statute that materially varied from the

Saving of the Prerogative from that Time may reasonably enough be accounted for ; inasmuch as such Persons, as aliened afterwards might be thought to have done it with their Eyes open, and in Defiance of the *Prerogative*, which the King therefore from that Time insisted upon.

Hence then we may suppose it partly arises, that a *new Manor* cannot be created at this Day ; for if this Statute was thought necessary, as plainly it was, to make such Alienations good from the Time of *Henry III.* the *Saving* of the King's *Prerogative* from that Time implied, that they were not from that Time to be countenanced ; And tho' Sir *Henry Spelman* (*Posthum. Treat. of ancient Deeds* 250.) supposes, that the Course of creating *new Manors* was stopt by the Statute *Quia Emptores Terrarum*, which restrained the Tenants of common Persons from aliening to hold of themselves ; yet it could not entirely stop it ; since the King's Tenants in *Capite* were not within the Restraint or Licence of that Law, and might, as they conceived, alien to hold of themselves, until they were in Effect restrained by the above-mentioned Statute of *Edward III.*

Brook, Roll and *Finch* give us another Reason, independent of both these Statutes, why a Man cannot at this Day create a *new Manor*, notwithstanding he give, say they, Land to many severally in Tail, to hold of him by Services and Suit of Court ; for tho', say they again, he may make a *Tenure*, yet he cannot make a *Manor*, because a *Manor* cannot be without a *Court*, and a *Court* cannot be but by Continuance Time out of Mind. *Vid. Bro. Tit. Compris.* 31, 34. *Tit. Tenure* 102. 2 *Roll. Ab.* 120. *Finch of Law* 142——But it is an obvious Objection to this Reasoning, that the like Reasoning might have prevented any Manors at all.

Law

161 *An Introduction to the*

Law of FEUDS in this Particular, was the Stat. *Quia Emptores Terrarum*, 18 *Edw. I.* which reciting the Inconveniences of *Feoffments* to hold of the *Feoffors*, and *not* of the *Lords* of the *Fee*, granted *Quod de cætero Liceat unicuique Libero Homini terras suas seu tenementa sua, seu partem inde ad Voluntatem suam vendere, Ita tamen Quod feoffatus teneat terram illam seu tenementum illud de capitali Domino feodi illius per eadem Servitia & Consuetudines, per Quæ feoffator suus illa prius tenuit.* So that this *Statute* took from the Tenants of Common Lords the feudal Liberty they claimed of disposing Part of their Lands *to hold of themselves*, and, instead of it, gave them a general Licence to sell all, or any Part, to hold of the *next immediate Lord* (i), which they could not have done before, without the Consent of the Lord.

(i) The Words *de Capitali Domino* in this Statute are to be understood of the next immediate Lord. 2 *Inst.* 501. and *Dominus Rex*, and *Dominus Capitalis* are in this Sense distinguished. *Bract. Lib. 2. Cap. 16. Sect. 7.*

This

This Statute however, not extending to the King or his Tenants in *Capite*, left them as they stood at Common Law, (k) until the Statute *de Prærogativa Regis*, 17 Ed. 2. cap. 6. viz, *Nullus qui de Rege tenet in Capite per servitium militare potest alienare Majorem Partem terrarum suarum ita quod residuum non sufficiat ad faciendum Servitium suum sine Licentia Regis, sed hoc non consuevit intelligi de membris & particulis* (l) *earundem terrarum.* Stanford understands this Restriction of Alienation of the greater Part without Licence, as a Concession, that such Tenant might alien the less (m); and yet it doth not appear that Alienations, even of Part with-

(k) Vid. F. N. B. 175. A. 211. I. 235. A. Lit. Sect. 140. 1 Inf. 43. b. 99. a. 133. b. 2 Inf. 67. a.

(l) This Declaration seems very extraordinary, inasmuch as it doth not appear, that the King's Tenants could, more than other Tenants at Common Law, alien to hold of their Lord without his Licence: And inasmuch as it was a Doubt from the Time of Henry III. to this Time, and for many Years after, whether such Tenants could, as the Tenants of common Persons, alien any Part to hold of themselves. Vid. Sup. 159. m.

(m) Stanf. de Prærog. Reg. 30. a.

163 *An Introduction to the*

out Licence, were ever practised by the *King's* Tenants in *Capite*, after this *Statute*: The Reason possibly might be, that as enough was, even by this *Statute of Prerogative*, to be kept in all Events to answer the Services, which were the Tenant's *Equivalent* for the *Whole*, nothing *less* than the *Whole* was thought sufficient to answer them (n).

But tho' the *Statute Quia Emptores Terrarum* did not set the *King's* Tenants in *Capite* at Liberty to alien without Licence, yet it impowered every one, who held of the *King* as of an *Honor, Barony, Manor, or Seignior*y, and *not* in *Capite*, to alien without Licence; and the Reason why the *King* was bound in the one Case and not in the other, seems to have been, that it is declared by *Magna Charta, Cap. 31.* that *Si quis*

(n) And therefore if a Tenant of the *King*, even after this *Statute*, aliened any Part of the Land without his Licence, the *King* might distrain in that Part for the whole Rent or Service. *Stanf. de Prærog. Regis 30. a.*

tenuerit

Law of Tenures. 164

tenuerit de aliqua Eschaeta sicut de Honore Wallingford——Et de aliis Eschaetis quæ sunt in manu nostra & sint Baronie (o) *non faciet nobis aliud servitium quam faceret Baroni, si Baronia esset in manu Baronis, & nos eodem modo eam tenebimus quo Baro eam tenuit——* So that the King was not, strictly speaking, bound by the Statute *Quia Emptores Terrarum*; but by this Chapter of *Magna Charta*, in which he declares that he would hold a *Barony*, as the *Baron* held it, and is therefore bound, because the *Baron* was or would have been bound by the Statute *Quia Emptores Terrarum*; And because Seifures were made, not-

(o) i. e. Baronies, Manors or Seigniories. 2 *Inf.* 64, for Manors were anciently called Baronies, as appears from Sir H. Spelman (*Gloss. ad Verb. Manerium*) who says, that *Manerium est Feodum nobile, partim Vassallis concessum, partim Domino in usum Familie sue cum Jurisdictione in vassallos ab concessa prædia reservatum, totum vero feodum Dominium appellatur, olim Baronia, unde Curia quæ huic præest Jurisdictioni hodie Curia Baronis nomen retinet——* And the same Author (*ad Verbum Baronia*) says, that *Baronia dicitur Quandoq; pro Manerio quandoq; pro Manerii territorio.*

165 *An Introduction to the*

withstanding this Chapter of *Magna Charta*, for Alienations and Purchases of Lands so holden without Licence; it is declared by the Statute 1 *Ed. III. Cap. 13.* that no man should from thenceforth be grieved by any such Purchase (p).

Upon this Construction of the Statutes *Quia Emptores Terrarum* & *de Prærogativa Regis*, the King's Consent being necessary to every Alienation of his Tenants in *Capite*, it was for some Years a Question, Whether, if such Tenant aliened without Licence, the Land so aliened was not *forfeited*; or whether the King should only *seise* it by Way of *Distress*, until a Fine should be paid for the Contempt (q); but this Question was settled by the Statute 1 *Edw. III. Cap. 12.* by which it is enacted, that the King should not hold Lands so aliened, as forfeit; but that from

(p) Vid. F. N. B. 175. A. Bro. Tit. Alienation, 33, 34.

(q) 2 Inf. 66. 1 Inf. 43. b. Britton, Cap. 18. fo. 29. a.

Law of Tenures. 166

thenceforth a reasonable Fine should be taken. But it remained much longer a Question, Whether the King's Tenants might have aliened any *Part* of their Lands *to hold of themselves*, as the Tenants of Common Lords might, before the Statute *Quia Emptores Terrarum*; but such Alienations made by Tenants, which held of *Hen. III.* or of *other Kings before him*, were at length made good by the Statute 34 *Edw. III. Cap. 15.* saving to the King his *Prerogative* (r) of the Time of his *Grandfather, Father, and of his own Time.*

(r) *Stanford* and the Lord *Coke*, both of them, suppose that this *Prerogative* was to have a *Fine only* for such Alienation. *Stanf. de Prærog. Reg.* 29. b. 30. a. 2 *Inf.* 65. *Quære F. N. B.* 235. c. But this could not be the *Prerogative* to the Time of *Edw. III.* because Fines for Alienation were *then first* (by the abovemention'd Stat. 1 *Edw. III. Cap. 12.*) to be taken instead of the Lands which had, till that time, been claimed as forfeit: But, as by that Statute Fines were to be accepted upon all *Alienations* of the King's Tenants without Licence, it might be thought, that *Subinfeudations, i. e.* Alienations by the King's Tenants to hold of themselves, were within the Equity of that Law, and that Fines ought therefore upon such Alienations to have been accepted from that Time, whatsoever Right or Claim the King might formerly have had to the Lands themselves.

167 *An Introduction to the*

Whatsoever the *Prerogative* was in this Particular, it is clear that Fines for Alienation were now (f) effectually Eftablished ; and that they were constantly paid until the Statute 12 *Car.2. Cap. 24*, which abolished them together with many other Burthens of Tenure.

2. As a Tenant could not alien his *Fee* or *Tenure*, without the Consent of his Lord, so neither could he, by the

(f) The Lord *Coke* infers from this Statute 34 *Ed. III.* that the King's Prerogative, to have a Fine for Alienation, began in the Reign of *Hen. III.* (2 *Inf.* 65, 501. 1 *Inf.* 43.) ; but that Statute, saving the Prerogative only from the Time of *Hen. III.* exclusive, cannot be understood to give, or even to suppose such Fines in the Time of *Hen. III.* Sir *Hen. Spelman* therefore says, that Fines for Alienation were not found among us before *Edw. I.* his Time ; and that they were not established by any Law until 1 *Edw. III.* *Spelm. Treat. of Feuds* 34. And yet no Body can say, that the King did not, as no doubt he might, from the very Original of Tenures accept previous Fines for his Licence or consent to alien, and Fines even subsequent to Alienation, where he was pleased so to do ; though it cannot be made out that he was bound to do it, before the Stat. 1 *Edw. III.* and therefore we may date the Original of the known Fines for Alienation from this Statute, and neglect the rest as occasional Transactions only.

Feudal

Law of Tenures. 168

Feudal (t) or *Common Law*, alien a *Fee*, that was not of his own Acquisition or Purchase, that is to say, a *Fee* that was not originally conferred upon him, but that came to him by Discent, even with the Consent of the Lord, without the Consent of the Heir (u), *Qui proximus erat in Successione collateralis* (x); for tho' the Law trusted an Ancestor with the Interest of his own immediate Descendants (y); yet he could not prejudice

(t) *Alienatio feudi paterni non valet etiam Domini Voluntate, nisi agnatis consentientibus, ad quos Beneficium quandoq; sit reversurum.* Feud. Lib. 2. Tit. 39.

—Stry. Exam. jur. feud. Cap. 2. Q. 19. & Cap. 19. Q. 2. Crag. de jur. feud. 346. 348.

(u) *Nisi ubi Hæredes tenentur ad Warrantiam*, says Bract. Lib. 5. Cap. 10. Sect. 4. Vid. 1 Inf. 94. b. Somn. Treat. of Gav. 39.

(x) Crag. de jur. feud. 346.

(y) The Law possibly presuming, as the Lord Coke supposes in a Case of the like Nature, that no Man would unnaturally prefer a Stranger to the Heir of his own Blood; (1 Inf. 373.) but Crag. gives another Reason, viz. that *Descendentium, si pater alienaverit, nulla habebatur ratio, quia ob Patris factum indigni reputabantur*, and that therefore *potestas consentiendi ad proximum Agnatum a Latere devolvebatur.* (Crag. de jur. feud. 346.)

This seems to be the better Reason, because according to the Book of FEUDS, *Si vassallus culpam committat, propter quam feudum amittere debeat, neque Filius neque ejus Descendentes ad id feudum revocabuntur, sed Agnati*———Vid.

169 *An Introduction to the*

judice the next Collateral, who having a distinct, tho' remote Interest in the feudal Donation, could not be deprived of it, but by an Act of his own. This manifestly hints the Foundation, and partly suggests the Reason of *Collateral Warranty*; tho' it is not to be conceived, nor is it within my present Design to enquire, how it came to pass, that the Concurrence or simple Consent of the next Collateral, which was at Law requisite to defeat his own Hopes of Succession only, should swell up to our Notions of *Collateral Warranty*, and be advanced into a mean to defeat even Estates, to which such Collateral could have no possible Hopes of succeeding (z).

3. As a Tenant could not alien, so neither could he subject the Te-

Feud. Lib. 2. Tit. 26. 31. 98. and Zasius in usus feud. Cap. 10. Fo. 100, 101, 102.

(z) Vid. Lit. Sect. 709. 1 Inf. 373. 2.

nancy or Fee to his Debts (a); for if he might, the feudal Restreint of Alienation might have been easily frustrated. It was upon this Ground, that Lands were not, at the Common Law, liable to any Execution for the Debts of the Tenant (b), until the

(a) Although upon strict feudal Principles, no Part of a Feud or Fee was liable to the Debts of the Feudatary; yet it must be confessed, that the feudal Text admits, that anciently, *Necessitate suadente, poterat Vasallus Domino in seio vel invito feudi partem (mediam feud. Lib. 1. Tit. 3.) vendere, retenta videlicet alia parte. Feud. Lib. 2. Tit. 9. Zasius in usus feud. 68, 69.* But this Practice was prohibited by a Constitution of Lotharius. *Feud. Lib. 2. Tit. 52.* — It appears by the *Custumier of Normandy*, that a Man could not sell or engage his Fief, without the Consent of the Lord; but that it was notwithstanding usual to sell or engage Part; viz. *aucun ne peut vender ne engager, se nest du Consentment au Seigneur, la terre que tient de luy par hommage; Non pourtant aucuns ont accoustume a vendre ou engager le tiers ou moins, pour tant que il remain de Fief, tant que les droictures & les faisances des Seigneurs & dignitez puissent estre faictes & payees aux Seigneurs. Grand Custum. de Norm. Cap. 29. Fo. 49.*

(b) *i. e.* Other than such as were due to the Lord upon Account of the Tenancy or Fee itself. All Lands being anciently, and in the King's Case even to this Day, clearly liable to all such Debts; observing only the Restraint of *Magna Charta Cap. 8.* viz. *Nos vel Ballivi nostri non seisiemus terram aliquam vel redditum pro Debito aliquo quamdiu Catalla debitoris presentia (upon the Spot) sufficient ad debitum reddendum, & ipse debitor paratus sit inde satisfacere.*

Statute

171 *An Introduction to the*

Statute *Westm. 2. Cap. 18.* subjected a *Moiety* (c), leaving the other *Moiety* to support and enable the Tenant to do the Services of the *Tenure*. This was the first Statute that any way subjected Lands to Execution; but several other Statutes, as the Statutes *13 Edw. I. de Mercatoribus*, *27 Edw. III. Cap. 9.* *23 Hen. VIII. Cap. 6.* were afterwards made, by which Lands were subjected, in a special Manner, to the particular *Liens* created by those Statutes.

4. As Tenants could not, by the Feudal or Common Law, alien their *Tenancies* without the Licence or Consent of the Lord; so neither could the Lord himself alien his *Seignior*y (d), that is to say, transfer the *Fealty* and Services of his Tenants without their Consent (e). Hence sprung the Doctrine

(c) Vid. 2 Inf. 394.

(d) Vid. Sup. p. 30.

(e) *Videndum si Dominus attornare possit alicui Homagium & servitium tenentis sui contra voluntatem ipsius Tenentis: Et videtur quod non, & maxime Homagium, quia tale sequeretur inconveniens quod possit eum subjungere Capitali Inimico suo, & per*

trine of *Attornment*, which was partly avoided by the present Method of Conveying to *Uses* (f), and is now, by a late *Statute* for Amendment of the Law, quite abolished (g).

5. It was likewise, as is before observed (h), altogether as much against the Nature of a FEUD, that the Feudatary should dispose of it by *Will*, as that he should otherwise alien it. Upon this Ground it was, that though Lands were deviseable until the *Conquest* (i), or rather until the Establishment of *Tenure*; yet then, or soon after (k), the Power of disposing by *Will*

per quod teneretur Sacramentum fidelitatis facere ei, qui eum damnificare intenderet——— *Est & alia causa quare homagium & servitium attornare non possit, ut si velit homagium attornare tali, qui nihil habeat in Bonis, unde possit warranzare, defendere, & excambium facere.* Bract. Lib. 2. Cap. 35. Sect. 13. 1 Inf. 309. a.

(f) Devised after the Statute 27 H. 8. Cap. 10.

(g) See the Stat. 4 Annæ, Cap. 16. Sect. 9.

(h) Vid. Sup. p. 31.

(i) Vid. Somn. Treat of Gav. 84. 89. Spelm. Treat. of Feuds 22.

(k) After the Coming of the Normans———a feudal Tenant, or Tenant by Knight-Service (as we call him) could not devise his Land by *Will* before the Statute
32 H.

173 *An Introduction to the*

Will generally vanished (l), except of *Socage* Lands and Tenements in some *Cities* and *Burroughs* (m), where it was retained (n), or rather indulged; it being of little Consequence into what Hands such *Tenures* fell. And thus far it is true, that *Nullum Testamentum apud nos mansit pro Lege* (o), until the Statutes

32 H. 8. though it were with Licence of the Lord, or of the King himself. *Spelm. Treat. of Feuds*. 21.—25. The Lord Hale indeed, (*Hist. of the Com. Law* 222.) supposes, that the Ancestor might, by *Will*, dispose as well *Lands* as *Goods*, till the Time of *Hen. II.* but this seems to be contradicted by *Glanvil*, who wrote about that Time. *Vid. Glanv. Lib. 7. Cap. 1. p. 45.*

(l) As being contrary to the Nature of *Tenures*; for the Restraint of disposing by *Will* was not merely cautionary (as some have thought), lest a Man should do that in *Extremis*, that he would not have done in his Health, or with his Senses about him; but it was strictly *Feudal*: And the legal Apprehension, or Presumption of Infirmary, seems to have been rather a Reason for continuing this Restraint so long after the Stat. *Quia Emp. Terr.* by which the Restraint of Alienation was taken away, than the Ground or Reason of the Restraint itself.

(m) At Common Law *Lands* were not deviseable: But by Custom in ancient *Cities* and *Burroughs*, *Socage* Lands and Tenements were deviseable. *Lit. Sect.* 167. 6 *Rep.* 16, 17. *Spelm. Treat. of Feuds* 25.

(n) *Vid. Somn. Treat. of Gav.* 89, 90. *Bacon Hist. of the Eng. Gov.* 203.

(o) *Vid. Spelm. Gloss. ad Verb. Gaveletum.*

Law of Tenures. 174

Statutes 32 & 34 *Hen. VIII.* gave a *Testamentary* Power over Lands, subject only to the Restrictions and Conditions of those Statutes. But though Lands were not, as is suggested, deviseable from the Time of the *Conquest* until the Time of *Henry VIII.* yet upon a Distinction started, soon after the Statute *Quia Emptores Terrarum*, between the *Land* and the *Use* or Profits of the Land, *Feoffments* to *Uses* were invented; by Means whereof a Man might, before the Statute 27 *H. VIII. Cap. 10*, by *Will* dispose of the *Profits*, though he could not dispose of the *Land* itself.

How far the Reader is satisfied concerning the Nature of *Tenure*, is not to be guessed; and therefore it may not be impertinent to shew, that the seeming Hardships in our Rules or Laws of Discent, as the Preference of the eldest Son, and of Males, the Exclusion of the Father and of the half Blood, are likewise Feudal, and that
they

175 *An Introduction to the*

they are to be accounted for only as such.

1. As to the Preference of the eldest Son, it is to be remembered, that though all FEUDS might, as above (p), originally fall among all the Sons ; yet that Course of Succession was varied (before any *System* of FEUDS was written or digested) in Consequence of a *Constitution* of the *Emperor Frederick*, viz. *Ducatus, Marchia, Comitatus de cætero non dividatur* (q) ; upon which FEUDS in general were divided into *Feuda dividua* & *individua* ; of the latter Sort amongst us, as well as the *Normans* (r), were the *Honorary* and *Mili-*

(p) Vid. Sup. p. 31. Spelm. Treat. of Feuds, 12. 43.

(q) Vid. Sup. p. 31. 32.

(r) Tout heritage est partable ou non partable: Len dict que l'heritage nest pas partable en quoy aulcune partie ne peut estre soufferte entre les freres par le Coustume de pays, sicome le Fief de Haubert, Les Contes & les Baronies, & les Sergenteries, en quoy la Garde appartient aux Seigneurs tant que les Heires soient en Aage. L'heritage est appelle partable en quoy le Seigneur ne peut reclamer aulcune garde. Sicome sont vavassoureries, & tout aultre tenement villain, & le Bordage & le Bourgage. *Grand Custum. de Norm. Cap. 26. Fo. 41. b.*

tary

Law of Tenures. 176

tary Fees or Tenures, to which the eldest Son, because he was soonest able to do the Duties of the Fee or Tenure, was in the Order of Succession singly preferred. But to all other FEUDS, as being *divisible*, all the Sons might equally succeed (f): And as for the *total Discent* even of *Honorary and Military Fees*, whether it obtained in *England*, before the above-mentioned *Constitution*, or afterwards (t), as a thing agreeable to the

(f) Cum quis Hæreditatem habens moriatur——Si plures reliquerit filios——distinguitur utrum ille fuerit Miles, sive per feodum militare tenens, aut Liber Sokemannus: Quia si miles fuerit vel per militiam tenens, tunc secundum jus Regni Angliæ primogenitus filius patri succedit in totum. Ita quod nullus fratrum suorum partem inde de jure petere potest. Si vero fuerit Liber Sokemannus, tunc quidem dividetur hæreditas inter omnes filios, quotquot sunt, per partes æquales, si fuerit Socagium & id antiquitus divisum. Glanv. Lib. 7. Cap. 3. p. 49. a.

(t) Mr. Somner supposes, that no one can doubt, that the Discent of Knight-Service Land to the eldest Son alone was less ancient than the Conquest. (Vid. Somn. Treat. of Gav. 82. 89.) Whereas this was a Constitution of *Frederick I.* who was not chosen Emperor until the Year 1152, or (as *Mat. Westm.* says) 1155, which was about the Time of our *Henry II.* in whose Time the Lord *Hale* says the total Discent first prevailed in *England*; (vid. *Hale Hist. of the Common Law* 221, 222, 226, &c.) and if so, it is

177 *An Introduction to the*

the Design and Nature of FEUDS, or whether it obtained with us in Imitation of other Countries, or by Virtue of an exprefs Law of our own (u), is not worth our Inquiry ; since it is certain, that it was thought convenient to preserve the *Fee*, and the Services of the *Fee* intire, as the best Means to maintain the military Force of the Kingdom upon a regular and established Foot (x) ; and that it did therefore every where prevail, and was every where inviolably observed (y) : But *Socage Tenures* not being of the same Importance, as

is not impossible that this Constitution should, in some Degree, hint or forward it ; for though this, or any other imperial Constitution, could not as such affect us ; yet the Ground or Reason of it being Feudal might prevail, as such.

(u) No Notice or Hint of any such Law is to be found, save only that the Author of the *Mirror* says, that among the Constitutions of our old Kings, *ordain fuit que Fee de Chivaler deviendroit al eigne firs per Succession de Heritage & que Socage Fee fuit partable perenter les males Infants.* Vid. *Mir. des Just.* Liv. 1. Cap. 1. Sect. 3.

(x) Vid. *Somn. Treat. of Gav.* 82. 1 *Inf.* 14. a. *Hale Hist. of the Com. Law* 223.

(y) Even in *Kent.* *Hale Hist. of the Common Law,* 225.

the

Law of Tenures. 178

the *Honorary* and *military Tenures*, were, as *Feuda dividua*, left to descend, according to the old Usages and Customs of the several Parts of the Kingdom where they lay (z). Inasmuch that it was some Time after the *total Discent* had, as above, prevailed, that *Socage*, in Imitation of the more Honourable *Tenures*, began generally (except in *Kent* and some particular FEUDS and Places, says the Lord *Hale* (a), which adhered to their Old Usages and Customs) to descend to the eldest Son; but where the *total Discent* was not admitted, the old customary *Discent* remained, and must still answer for the particular local *Discents* (b) remaining at this Day.

2. As to the Preference of *Males*, it must be remembered, that *Females*

(z) Somn. Treat. of Gav. 82, 90.

(a) Vid. Hale Hist. of the Com. Law 119, 120, 153, 154, 226, 228.

(b) As of Lands of the Nature of *Borough English*, *Gavelkind* and the like. Vid. Lit. Sect. 165, 210, 211.

179 *An Introduction to the*

could not by the Feudal Law succeed to a *proper* FEUD; because they were unequal to the Duties or Services, for the sake of which it was chiefly created (c). And if it be farther observed, that it is *ex pacto*, or by the *Custom* of particular Countries, that they are even at this Day admitted to succeed to any (d); it cannot seem strange, that the feudal Preference given to *Males* (e) should prevail with us: Because as *Feud*, *Fee*, and *Tenure*, are Synonimies, and import but one and the same Policy, such Preference is plainly agreeable to the

(c) Vid. Sup. p. 28.

(d) *Proles fæminei sexus, vel ex fæmineo sexu descendens, ad successionem aspirare non potest, nisi ejus Conditionis sit feudum, vel ex pacto acquisitum.* Vid. Feud. Lib. 2. Tit. 2. Sect. 2. Tit. 11. 30. 50. 104. Stry. Exam. jur. Feud. Cap. 4. Q. 9. *Fæmininum Feudum est, quod vel a Fæmina descendit, vel in quod Fæminæ succedunt, quod cum a propria feudi Natura abhorreat — aliunde ex pacto, aut a moribus Regionum, sive Provinciarum introductum est.* Crag. de jur. Feud. 52, 236, 237.

Vid. Feud. Lib. 1. Tit. 6. & Lib. 2. Tit. 11, 17. Hanneton. de jure Feud. Lib. 2. Cap. 9. Stry. Exam. jur. Feud. Cap. 4. Q. 12. Crag. de jur. Feud. 53.

Nature

Law of Tenures. 180

Nature of *Tenures*, and highly reasonable (f).

3. As to the Exclusion of the Father from any possibility of succeeding to the Son's Inheritance, as such, it is certain, that the Father cannot succeed to the Son; because it is against the feudal Rules and Course of Succession (g), which did not obtain against

(f) Vid. LL. H. 1. Cap. 70. Stat. de Prærog. Regis Cap. 16. Glanv. Lib. 7. Cap. 3. p. 50. a. Somn. Treat. of Gav. f. 8.

(g) *Successionis feudi talis est Natura quod ascendentes non succedunt, verbi gratia, Pater filio.* Feud. Lib. 2. Tit. 50, 84. Ravenna in Consuetud. Feud. Tit. 50. Upon which the Maxim in our Law, *Que Enheritance poet linealment discender, mes nemy ascender*, (Lit. Sect. 3.) may be supposed to be grounded.

In this Respect the Alodial and Feudal Property differed (Vid. Hanne-ton. de jure feud. Lib. 2. Cap. 5. p. 164) It appears Int. Leg. Salicas, Tit. 62. D'Alode, & Int. Leg. Ripuariorum Tit. 56. *De Alodibus*, that *Si quis mortuus fuerit & filios non dimiserit, si pater aut mater superfuerint, ipsi in Hæreditatem succedant*; (Vid. Linden. Collect. Leg. Antiq.) And, as this seemed highly reasonable, the feudal Course of Succession was in Normandy varied in Favour of the Father; viz. *Sil nya aulcun des freres ne de leur Enfants l'heritage revient au pere de que les freres yiffrent. Et sil est mort il reviendra a ses freres que sont oncles a celui de qui il Eschat. Et sil nya aulcun des oncles ne de leurs Enfants il reviendra a lael.* Grand. Custum. de Norm. Cap. 25. fo. 40. a. ——— And there is a Law of our Henry I. to the same Effect, viz. *Siquis sine Liberis decesserit,*

181 *An Introduction to the*

gainst Reason; for if the FEUD was really what the Feudists called *antiquum aut Paternum* (h), the Father could not succeed to it, because it must have passed him, before it could possibly have come to the Son (i). And if a FEUD was newly and originally given to, or conferred upon the Son *ut feudum Antiquum*, such FEUD did in all Respects descend, as if it had been really an *ancient or paternal Feud* (k); which must, as is

Pater aut mater ejus in Hæreditatem succedant, &c. (Vid. LL. H. 1. Cap. 70.) But I do not find that this Law, which, though agreeable to the Customary of Normandy, was so contrary to the feudal Rules of Succession, was ever observed. *Vid. 1 Inf. 11. a. Hale Hist. of the Com. Law 226, 227.*

(h) Vid. Sup. p. 25.

(i) *Si Feudum de cujus Successione agitur Paternum vel Antiquum sit, Patrem filio vel Avum Nepoti, & sic deinceps succedere impossibile est, cum feudum paternum vel antiquum a Patre vel Avo in Filium vel Nepotem, & sic deinceps, defluat.* Hanne-ton. de jure Feud. p. 164. Stry. Exam. jur. Feud. Cap. 16. Q. 2, 3. 4. Zasius in usus Feud. Cap. 8. fo. 46.

(k) *Moribus receptum est, quod feudum novum, antiqui feudi jure concedi possit, & Antiqui Naturam assumet.* Zasius in usus Feud. Cap. 12. fo. 124. ——— *eatenus* ——— *ut illud feudum novum juris antiqui habeatur, id est ut eadem Privilegia habeat, & eosdem effectus quos antiquum.* Crag. de jur. Feud. 55.

said

said before, have passed the Father, before it could have come to the Son, and upon this Notion the Father was in this Case excluded. On the other Hand, if the FEUD was what the Feudists call *Novum* (l), that is to say, newly conferred upon, or (as we say) purchased by the Son, and not granted to him *ut Feudum antiquum*, it could only descend to his Children; (m) and if he had no Children, it could not *mount* to the Father, or *incline* to any Collateral, but should *return* to the Lord (n). And thus the Father was totally excluded. Thus stood the Feudal Law, because whoever would succeed to a FEUD must

(l) Vid. Sup. p. 25.

(m) *Nomen hæredis in prima investitura expressum tantum ad Descendentes ex Corpore vasalli primi extenditur——In jure Descendentes tantummodo succedunt in Feudo novo.* Crag. de jur. Feud. 50, 52. Stry. Exam. jur. Feud. Cap. 16. Q. 4, 5.

(n) *Sin autem novum fuerit, vasallo, qui ipsum recepit, sine liberis Masculis decedente, neque ejusdem Patri, avo, pro-avo, & sic deinceps ulteriori ascendenti, nec ejusdem Agnatis defertur: Sed statim ad Dominum ipsum regreditur.* Han- neton. de jur. Feud. Lib. 2. Cap. 5. p. 164. Zasius in usus Feud. Cap. 8. fo. 46.

183 *An Introduction to the*

have intitled himself to the Succession in a regular Course of Discent from the first Feudatary (o), or Purchaser ; and this was, no doubt, the Ground of that old and true *Maxim* (as the Lord *Coke* calls it) (p) in our Law, that none shall inherit any Lands as Heir, but only the Blood of the first Purchaser. But it may be objected, that this *Maxim*, and the Glosses or Reasoning upon it, will not hold with us at this Day, because it is (now at least) sufficient by our Law, that the Person, who claims a *Fee* by *Discent*, make it appear that he is Heir to him *who was last actually seised* (q); and that it is therefore strange (r), that the Father, who

is

(o) *Semper enim feudum stipitem respicit, quod nulli nisi ex stipite succedant.* Crag. de jur. Feud. 55. sup. 18.

(p) 1 Inf. 12. a.

(q) But this Rule does not extend to Estates Tail, Dignities, or Crown Lands. *Vid.* 1 Inf. 11. b. 15. a. b. 3 Rep. 41, 42.

(r) *Mirum cuivis videri possit, cum Pater Patruo uno gradu sit filio propior, tamen illi (scilicet Angli) prohibent patrem a filii successione, Patruumq; defuncti Patris fratrem ei præferunt, Quod si is Patruus sine Liberis decesserit, ei in omnibus*

bus

is next in Blood, should not be Heir to his Son, and next in Succession; but that the Uncle or Father's Brother should be preferred to him; and yet that, in Case the Uncle died without Issue, the *Father* should be admitted, as *Brother* to the *Uncle*, to succeed to the Son's Inheritance (f).

To this it may be answered, that the seeming Hardship or Absurdity arises from a Misapprehension of this Rule, considering it as a substantive Rule of Discent; whereas it is not properly a Rule of Discent; but of Evidence, and is not therefore Substantive, but relative to the old feudal Course of Succession, and calculated to make that good as far as possible; for it becoming in many Cases impossible, by Length of Time

bus succedet ejus frater, qui defuncti erat pater, & sic pater ad hæreditatem & successionem filii pervenire poterit, sed non ut pater, sed ut frater patru, &c. Crag. de jur. Feud. 234.

(f) Vid. Lit. Sect. 3.

185 *An Introduction to the*

and a long Course of Discents, to deduce a Title from the first Feudatary or Purchaser, Proof of being Heir to the last was necessarily allowed as the best Proof that could be expected of Title from the first. Hence therefore it is, that the Father, though he stands upon the old Foot as to the Son himself, yet, as he may, within the feudal Rules of Succession, succeed to the Uncle as his Brother, may, as Heir to his Brother (t), make Title even to the Son's Inheritance passing through him; our Law, for the Reason above-mentioned, looking no farther Back than to the Uncle, who was the Person last actually seised. And it is observable, that the Caution with which this Rule was admitted, shews evidently, that it was not innovating or meant to vary the old Course or Rules of Discent, but that it was devised meerly to substitute a

(t) For the Brother or Sister *cum seisinam suam obtinuerunt, stipitem faciunt*, &c. Fleta Lib. 6. Cap. 2. Sect. 2.

reason-

Law of Tenures. 186

reasonable in the stead of an impossible Proof; for the Person who would, within the Sense and Intent of this Rule, intitle himself to a *Fee* by *Discent*, must be Heir of the *whole Blood* to him who was last seised (u), and as such, of the Blood of the first Purchaser. It is upon this Ground therefore, that *Possessio fratris facit sororem esse Hæredem*, and that the *half Blood* is excluded (x). And thus the Exclusion of the *half Blood*, which hath been thought strange (y), is to be accounted for, as a thing grounded upon tolerable Reason.

A *Fee Tail*, as distinguished from a *Fee Simple*, is a *Fee limited* and re-

(u) Vid. Lit. Sect. 6, 7, 8. 1 Inf. 15.

(x) Contrary to the Custom of Normandy and to the Laws of Scotland. Vid. Custum. de Norm. Cap. 25. fo. 41. b. Hale Hist. of the Com. Law 219. Crag. de jur. feud. 244.

(y) Mirum quod ab Anglis observatur, si quis cum duas conjuges haberet, ex una filium, ex altera plures filios, & post mortem patris hic filius hæreditatem paternam Agnoverit, desertivusque in hæredem patri fuerat, postea & ipse moriatur, non tamen ei succedit frater Consanguineus in hæreditate, nec enim est ex toto sanguine ut illi loquuntur. Crag. de jur. Feud. 243.

strained

187 *An Introduction to the*

strained to some *particular* Heirs exclusive of others (z), as to the Heirs Male of the Body of the Donee or Feudatary, exclusive of Females and Collaterals; or to the Heirs of his or her Body, exclusive of Collaterals only. It was first called a *Fee Tail* from the *French* Word *Tailler*, *Scindere* (a), upon Account of the particular Limitation or Restriction by which the Heir general was often, and collateral or remote Heirs were always cut off (b). But such *Fee*, that is to say a *Fee* thus limited, was at Common Law known by the Name of a *Fee Conditional*, so called from the Condition expressed or implied in the Gift or Constitution of the *Fee*, that in Case the Donee died

(z) *Donationum, alia absoluta & larga, & alia stricta & coarctata, sicut certis hæredibus, quibusdam a Successione exclusis.* Fleta, Lib. 3. Cap. 3. Braët. Lib. 2. Cap. 5. Sect. 3. Brit. Cap. 34. p. 89. a. Lit. Sect. 18.

(a) Vid. 1 Inf. 18. b. & Skinner Etymol. Ling. Angl.

(b) *Feodum talliatum est quod ita talliatur, hoc est amputatur & rescinditur, ut ad nullos transeat hæredes nisi a corpore, &c.* Spelm. Gloss. ad Verb. Feodum.

without

Law of Tenures. 188

without such *particular* Heirs, the Land or *Fee* should *revert* to the Donor (c). But notwithstanding such Limitation or Restriction was agreeable to the Nature of FEUDS (d), and the Condition itself no other than (whether expressed or not) was implied in every such Gift (e); yet our Ancestors were, after Heir or Issue had, suffered at Common Law to alien such *Fee* (f), and to defeat the Donor as well as the Heir, upon

(c) It appears by the Preamble of the Statute *de Donis*, that the Limitation of a *Fee Conditional* at Common Law, was the same as that of a *Fee Tail* at this Day.

(d) *¶ns feudale*———*non solum tallis non adversari sed maxime eis favere constat, non solum quod nullas fœminas ad successionem admittit*———*Sed multo magis quod tenorem Concessionis semper servandum jubeat, hæreditatemq; secundum eam deferendam expresse jubeat, &c.* Crag. de jur. Feud. 147.

(e) *Car Syl nust ceo expresse per parols, uncore tant fuit imply en le done*———*Et si les parols fueront expresse en le fait de done, uncore ne fuyt Condition en fait, mes serroit Condition en Ley.* Dit per Weston Justice, Plowd. Com. 241. b. 242. a.

(f) Justice Brown reckons this one of many Torts permitted at Common Law without Redress; and that this was tortious, he infers from the Statute *de Donis* itself. Plowd. Com. 247.

a Sup-

189 *An Introduction to the*

a Supposition, that the Condition was for this Purpose satisfied or perform'd by the Donee's having Issue (g): This Notion and the consequent Practice, being manifestly contrary to the Form and Intent of the Gift, was reformed by the Statute of *Westm. 2. Cap. 1.* (commonly called the Statute *de Donis*) which required, that from thenceforth the *Will* and Intent of the Donor should be observed, and that a *Fee* so given should in all Events go to the Issue, and for want of Issue, revert to the Donor (h); so that, though *Littleton* says, that a *Fee Tail* is by Force of this Statute; for that, before, all Inheritances were *Fees Simple, Absolute* or

(g) Vid. 1 Inf. 19. a. Plowd. Com. 242, 245. b. 247. a.

(h) *Dominus Rex Statuit, quod voluntas Donatoris, secundum formam in Charta Doni sui manifeste expressam, de cætero observetur, ita quod non habeant illi, quibus tenementum sic fuit datum sub Conditione, potestatem alienandi tenementum sic datum, quo minus ad exitum illorum, quibus tenementum sic fuerit datum, remaneat post eorum obitum, vel ad Donatorem vel ad ejus Hæredem, si exitus deficiat, revertatur.* Stat. de *Westm. 2. Cap. 1.* 2 Inf. 332.

Condi-

Law of Tenures. 190

Conditional (i); yet it is certain, that this Statute did not create any new *Fee*, *aut re aut nomine*, but that it only severed and distinguished the Limitation from the Condition, and restored the Effect of each, that is to say, the Effect of the Limitation to the Issue; and the reversion, as the proper Effect of the Condition, to the Donor (k), according to the Plain Import and manifest Intent of the Gift: And yet, as by Means of this Statute the Limitation was raised above the Condition, the *Fee* might thenceforth be denominated from the Limitation, which as now established, was become the Substance, as it was in Truth, before, the immediate End of the Gift.

II. Estates for *Life* are either *Conventional* or *Legal*: Of the first Sort are such Estates, as are in their Crea-

(i) Lit. Sect. 13.

(k) Vid. Plowd. Com. 242. a. 247. b. 248. a.

tion

191 *An Introduction to the*

tion *expresly* given or conferred for the *Life* of the Tenant only. Of the second Sort are Tenancies in *Tail*, after Possibility of Issue extinct, Tenancies in *Dower*, and by the *Curtesy*: which are particular Estates, not created or limited by any positive Act or Provision of the Parties, but by the Disposition and Order of the Customary or Common Law of *England*.

1. *Conventional* Estates for *Life*, though they in many Respects differ from Estates in *Fee*, are nevertheless of a feudal Nature, and fall properly within the feudal Sense of the Word *Beneficium* (1); for they are given or conferred by the same Rites, and with the same Solemnity as *Fees*, and are held by *Fealty*, and such conventional Services as the Lord and Tenant agree upon.

2. A Tenancy in *Tail after Possibility of Issue extinct*, being a *special* Estate *Tail* without Possibility of

(1) Vid. Sup. p. 19.

Law of Tenures. 192

Succession or Continuance beyond the Life of the Tenant (m), was held by the same Services, continued to be of the same Nature, and was, no doubt, as much a FEUD, as the Estate *Tail* ever was; so that it is distinguished by this particular Name or Description, meerly to suggest the legal Disadvantages (n) cast upon such Estate *Tail*, when turned to an hopeless Inheritance.

Dower (o), called by *Crag Triens* & *Tertia* (p), and known to the Feudists (q) by several other Names (r), was probably brought into Eng-

(m) Vid. Lit. Sect. 32, 33, 34.

(n) Vid. 1 Inf. 28. a.

(o) The legal Sense and Qualities of it are largely explained by *Littleton* and *Coke*. 1 Inf. 30. b. &c.

(p) Vid. *Crag*. de jur. Feud. 308.

(q) And yet according to *Schilter*, *veteri jure feudali Dotalitium in feudo constitui vix poterat; quam sententiam adhuc sequuntur Wesenbechius, Koepen*———*Et alii: Introducitur tamen fuit a Friderico II. Imp. ut in Feudo Dotalitium constitui possit.* Vide *Schilt.* Instit. jur. Feud. Cap. 6. Sect. 17. & Cap. 7. Sect. 8.

(r) Vid. *Hotoman* de Verb. Feudal. sub Verb. *Dotalitium* & *Morganatica*. *Skene* de Verb. significat. ad Verb. *Dos*; & *Spelm.* Gloss. ad Verb *Doarium* & *Morgangiva*.

land

193 *An Introduction to the*

land by the *Normans*, as a Branch of their Doctrine of *Fiefs* or *Tenures* (f); for we find no Footsteps of Dower in Lands, until the Time of the *Normans* (t): But on the contrary, Provision is made, by one of the Laws of the *Saxon King Edmund* (u), for the Support of the Wife surviving her Husband, out of his Goods only (x).

Tenancies by the *Curtesy* (y), or *per Legem terræ*, though so called

as

(f) Vid. *Custum. de Norm. Cap. 101. fo. 124. & Le Stille de proceder en Norm. fo. 76.*

(t) Vid. *Bacon. Hist. of the Eng. Gov. 104, 146, 147.*

(u) *Cap. 51.*

(x) Nor was there any *Dower* in *Wales* until it was annexed to the *Crown of England*, as appears by the *Statuta Walliæ*, viz. *Quia Mulieres hætenus non extiterant dotatae in Wallia, Rex concedit quod Dotentur.*

(y) The oldest Description of this *Curtesy*, now extant, is to be found in *Glanvil, Lib. 7. Cap. 18. p. 60.* But because it is with greater Authority, and much better, expressed in a Writ 11 H. 3. I shall give it the Reader as I find it there, viz. *Cum consuetudo & Lex Angliæ fuerit, quod si aliquis desponsaverit aliquam mulierem, sive viduam, sive aliam hæreditatem habentem, & ipse postmodum ex ea prolem suscitaverit, cujus Clamor auditus fuerit inter quatuor Parietes, idem Vir, si supervixerit ipsam uxorem suam, habebit tota vita sua Custodiam Hæreditatis uxoris suæ, licet ea forte habuerit*

Law of Tenures. 194

as if they were peculiar to *England* (yy), were known not only in *Scotland* (z), but in *Ireland*, and in *Normandy* also (a); and the like Law or Custom is to be found among the antient *Almain* Laws (b); and yet it doth
not

habuerit Hæredem de primo Viro suo qui fuerit Plenæ ætatis.
Rot. Claus. 11 H. 3. Hale Hist. of the Com. Law 180.

Note, That it is sufficient at this Day, that a Child be born alive, though not heard to cry. Lit. Sect. 35. 1 Inf. 29. b. and that this Curtesy is fully treated of, 1 Inf. 29. 8 Rep. 34.

(yy) *Such tenant est appel tenant per le Curtesie D'Engleterre, pur ceo que ceo est use en nul auter realme, forsq; tant-solement en Engleterre.* Lit. Sect. 35.

(z) *Angli Curialitatem Anglicam vocant, quasi ea apud solos Anglos locum haberet; sed falluntur, nam apud nos (Scotos scilicet) & Normannos huic Curialitati locus est — Curialitas sive Curtesia est totius patrimonii ususfructus quod ad uxorem pertinebat, dum moreretur — Competit autem hæc Curtesia quoties quis Hæredem Fœminam in uxorem duxerit, & ex ea sobolem vivam susceperit.* Crag. de jur. Feud. 312. Vid. Skene de Verb. significatione ad Verb. Curialitas. Sir. G. Mackenzie Inf. of the Law of Scotland, Lib. 1. Tit. 6. Sect. 16. & Lib. 2. Tit. 9. Sect. 44.

(a) Vid. Custum. de Norm. Cap. 119. 1 Inf. 30. a.

(b) *Viz. Si qua mulier quæ Hæreditatem paternam habet post Nuptum pregnans peperit puerum, & in ipsa hora mortua fuerit, & Infans vivus remanserit aliquanto spatio vel unius horæ, ut possit Aperire oculos & videre Culmen Domus, & quatuor Parietes & postea defunctus fuerit, Hæreditas materna ad Patrem ejus pertineat, & tamen si Testes habet Pater ejus, quod vidissent illum Infantem oculos aperire & potu-*
O isset

195 *An Introduction to the*

not seem to have been Feudal (c) ; nor doth its Original any where satisfactorily appear : Some *English* Writers (d) ascribe it to *Henry I.* but *Nathaniel Bacon* calls it a Law of *Countertenure* to that of *Dower* ; and yet supposes it as ancient as from the Time of the *Saxons*, and that it was therefore rather restored by *Henry I.*, than introduced by him (e) : But as there are no Notices of this *Curtesy* among the Laws of the *Saxons*, or among those we have of *Henry I.*, I shall propose Mr. *Crag's* Conjecture

isset Culmen Domus videre & quatuor Parietes, tunc Pater ejus habeat Licentiam cum Lege ipsas res defendere. Vid. LL. Alamannorum Tit. 92.

(c) *Maritus uxori non succedit in feudo, etiam fæmineo, nisi specialiter sit investitus.* Feud. Lib. 1. Tit. 15. Lib. 2. Tit. 13, 85. Ravenna in Consuetud. Feud. Tit. 15. Stry. Exam. jur. Feud. Cap. 16. Q. 22, 23.

(d) The Author of the Mirror says, that *Grant fuit de la Curtesy le Roy Henry le premiere que tous ceux que survivissent leur femmes dount elles ussent conceive tenussent les heritages leurs femmes a tous jours.* Mir. des Just. Lib. 1. Cap. 1. Sect. 3. p. 20. Vid. Seld. Jan. 65. Cowel Instit. Lib. 2. Tit. 2. Sect. 18.

(e) Vid. Bacon. Hist. Disc. of the Eng. Gov. 105. 147.

as the most rational I have met with, who is so far from thinking it *Feudal*, that he is of Opinion, that the Original of it *ex Jure Civili non incommode deduci potest; ex Constantini enim Rescripto* (says he) *sancitum est, ut hæreditatis maternæ Pater usum-fructum, filii Proprietatem haberent* (f).

It being high Time to close this Inquiry into the Nature of Estates held by *Common Socage*, I shall now briefly hint the several *Forfeitures* of such Estates, and then submit it.

These *Forfeitures* are various, and may be considered as they respect either Estates in *Fee* or for *Life*.

I. *Forfeitures* of Estates in *Fee*, though they were very many by the Feudal (g), and Common (h) Law, are reduced, as the Law now stands, to *Forfeitures* by *Attainders* of Trea-

(f) Crag. de jure Feud. 312.

(g) Vid. Sup. p. 43, 44. & Spelm. Gloss. ad verbum Felonia.

(h) Vid. LL. Hen. I. Cap. 43. Glanv. Lib. 9. Cap. 4. fo. 68. b. & Bract Lib. 2. Cap. 35. Sect. 11, 12.

197 *An Introduction to the*

son and Felony, (concerning which I have already said as much as is necessary to my present Purpose, under the Head of *Escheat*) and by *Cesser*.

That we may form a right Notion of this Forfeiture by *Cesser*, it must be observed, that by the feudal Law, if the Vassal did not answer the Duties or Services of the FEUD, the Lord might anciently (in the Infancy of FEUDS) resume it: But that, as the Feudal military Policy gradually subsided into a mix'd, a civil as well as military Policy, and gave way to Courts, regular Process, and a judicial Determination of Right, Care was taken that no Vassal or feudal Tenant should be dispossessed or deprived of his FEUD or *Fee*, but for some determined and known Offence, and by the Judgment of his Peers (i), which he was so far bound to submit

(i) *Nullus miles sine certa & Convieta culpa suum beneficium perdat, nisi secundum consuetudinem antecessorum suorum, & iudicium parium suorum.* Vid. Feud. Lib. 3. Tit.

Law of Tenures. 198

submit to; that, if he neglected to appear in the Lord's Court upon the third Summons, the Lord should be put into Possession of the *Fee*, until he should think fit to appear; which if he did within the Year, the Possession was restored to him: If not, he totally lost it (k). Thus stood the feudal Law; and in this the Feudal

Tit. 1. Lib. 1. Tit. 7, 21, 22. & LL. Longobard. Lib. 3. Tit. 8. Sect. 4.

Note, That pares sunt qui ab eodem Domino feudum tenent (Feud. Lib. 1. Tit. 26.) & dicuntur convasalli, sive compares; quasi ejusdem Patroni concientes (Hotom. de Verb. Feudal. ad Verb. Pares) in eodem territorio (Stry. Exam. jur. Feud. Cap. 25. Q. 2. Crag. de jure Feud. 377.) Pares sunt Appellati, quod ratione Homini ac tenuræ sibi invicem pares sunt, unig; Domino subsint, & pari lege vivant——Convassalli autem diversarum Baroniarum, seu territoriorum, eidem Domino subjeñti, non dicuntur proprie pares. Vid. Du Fresne & Spelm. Gloss. ad Verb. Pares.

(k) *Dominus vocat militem, qui ab eo feudum possidebat, dicendo eum in culpam incidisse, per quam feudum amittere debeat, hic non respondet: Quæritur, quid faciendum sit Domino? Respondeo, eum ad Curiam vocari debere, & si non venerit, iterum eum debere vocari usque in spatio tertio septem vel decem dierum, arbitrio ejusdem Curiae terminando; quod si neq; venerit ad tertiam vocationem, hoc ipso feudum amittat: Et ideo debet Curia Dominum mittere in possessionem. Sed si intra annum venerit, restituitur ei possessio: Alioquin & beneficium, & possessionem amittit. Feud. Lib. 2. Tit. 22. Raven. in Consuetud. Feud. 161.*

199 *An Introduction to the*

and Common Law nearly agreed; insomuch, that no *Freeholder* could, even at Common Law, be dispossessed or disseised of his *Fee* or *Freehold*, without the like Judgment (l); but if he with-held the Services due to his Lord, the Lord might summon him into his own Court (m), and might, if he neglected to appear upon due Summons, for such Neglect or Contempt, seise the *Fee* (n), and with-hold it from him, un-

(l) *Unusquisque per pares suos judicandus est, & ejusdem Provinciæ: Peregrina vero judicia modis omnibus submovemus.* LL. Hen. I. Cap. 31, 55. Vid. LL. Will. I. Cap. 27. And that this was the Common Law, appears from the Declaration in *Charta Johannis*, viz. *Nullus Liber Homo — disseisatur — nisi per legale judicium parium suorum, vel per legem terræ.* And from the like Declaration in *Charta Hen. III.* viz. *Nullus Liber Homo — disseisatur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis — nisi per legale judicium parium suorum, vel per legem terræ.*

(m) *Omni Domino licet summonire hominem suum, ut sit ei ad rectum in Curia sua.* LL. Hen. I. Cap. 55. Vid. Le Mirror fo. 17, 172, 173. Bacon Hist. of the Eng. Gov. 202. Glanv. Lib. 9. Cap. 1. p. 69. a.

(n) *Si quis hominem habeat, qui ei nolit esse ad rectum, si quid de eo tenet post legitimam summonitionem* (Vid. LL. Will. I. Cap. 42.) *saisiari faciat.* LL. Hen. I. Cap. 41.

til

til he should think fit to satisfy the Demand, or to appear, and make his Defence (o). This Seifure was in the Nature of a *Distress*, and was probably the only *Distress* warranted (p) until the *Magna Charta* of King *John*, wherein the King makes the following Declaration; viz. “*Nec*
“*nos nec Ballivi nostri seisiemus ter-*
“*ram aliquam, nec redditum, pro*
“*debito aliquo, quamdiu catalla debi-*
“*toris sufficiunt ad debitum reddend-*
“*dum*” (q). In Consequence whereof, the King could not from thenceforth seise the *Fee*, but for want of Chattels. This Declaration, doubtless

(o) *Si Dominus per considerationem Curiae suae pro defectu servitii ceperit tenementum tenentis sui in manum suam, sicut simplex nadium, donec de redditu fuerit satisfactum—— cum talis cujus tenementum fuerit, optulerit de satisfaciendo, de redditu & arreragiis, restitui debet ei possessio, &c.* Bract. Lib. 4. Cap. 27. fo. 205. b.

(p) *Abusion* (scilt' de la Commen Ley) est a distreiner pur arrerages de services issuants de fiews per biens movables, ou nul distresse ne se doit faire forsque per le fiew. Mir. 308. & Vid. ibid. 17.

(q) There is the same Declaration in *Mag. Char. Hen. III.* very little varied; viz. *Nos vero vel Ballivi nostri non*

O 4

seisia-

201 *An Introduction to the*

less, was understood to extend equally to all inferior Lords; who might however still, (for ought appears) as well as the King, for want of Chattels, distrain the *Fee*, itself: But this Power, together with all Jurisdiction relating to the *Fee*, was soon after taken from them by the *Statute of Marlbridge*, 52 Hen. III. Cap. 22. viz. *Nullus de cætero possit distringere libere tenentes suos ad respondendum de libero tenemento suo, nec de aliquibus ad liberum tenementum suum spectantibus sine brevi Domini Regis*: In Consequence whereof the Distress of all inferior Lords became absolutely Personal; insomuch, that, if there were no Chattels to be found within the *Fee*, Jurisdiction, or Distress of such Lords (f), they had no Means in their

seissemus terram aliquam nec redditum pro debito aliquo, quamdiu catalla debitoris præsentia sufficiunt ad debitum reddendum, & ipse debitor paratus sit inde satisfacere.

(f) *Nullus insuper major vel minor——distractiones faciat extra feodum suum, seu locum ubi Balivam habeat, vel Jurisdictionem.* Stat. Marl. 52 Hen. III. Cap. 2.

own Hands to inforce the Performance of their Services; which being in some Respects inconvenient to them, it was afterwards provided by the Statutes of *Glocester* (t) & *Westm.* 2. (u), that in Case a Tenant should cease to pay his Rent for two Years, and there should not during that Time be sufficient Distress upon the Land, the Lord might have a *Cessavit*; and by Means thereof, if the Tenant did not tender his Arrears before Judgment, the Lord should upon such *Cesser*, recover the Land, or *Fee* its self, and bar the Tenant for ever (x).

Besides these Forfeitures by *Attainder* and by *Cesser*, the Lord *Hale* mentions another by *Alienation contra formam collationis* (y), which is supposed to have been grounded upon

(t) 6 Edw. 1. Cap. 4.

(u) 13 Edw. 1. Cap. 21.

(x) Vid. 2 Inf. 295, 400, 460. Booth of real Actions 133, 134. F. N. B. 208. H. 209.

(y) Hale Anal. 110.

the

203 *An Introduction to the*

the Statute *Westm. 2. Cap. 41.* But whether this Forfeiture be considered as a Forfeiture created, or revived, or inforced only (z) by this Statute, it is no otherwise worth our present Notice (a), than as it favours of the ancient feudal Restraint of Alienation, and may be thought to have had its Rise from thence.

2. Estates for Life, besides that they are forfeitable by *Attainder* and by *Cesser*, are likewise, agreeably to the Law of FEUDS (b), forfeited by *Wast* (c), and by all such Acts as in the Eye of the Law tend to devert or defeat the Reversion or Remain-

(z) *Fitzherbert* says that the Writ *Contra formam Collationis* was given by the Stat. *Westm. 2.* (*F. N. B. 211. H.*) as if the *Remedy*, rather than the *Forfeiture*, was given by that Statute. *Vide 2 Inf. 456, 457, 459. & F. N. B. 211. F. G.*

(a). Because, according to *Fitzherbert*, the Writ *De contra formam Collationis* lay only for Alienations by Abbots, &c. of Lands given before the Statute *Quia Emptores terrarum* to hold in *Frankalmoign.* *F. N. B. 210. F. 211. J.*

(b) *Vid. Sup. p. 44.*

(c) *Vid. Le Stat. de Gloc', Cap. 5.*

der

Law of Tenures. 204

der (d), or in any Manner to pluck the *Seignior*y out of the *Lords* Hands: *Nil* enim, (says *Glanvil*) *de jure facere potest Quis salva fide.*—*Quod vertat ad exhæredationem domini sui*; and therefore (according to the same Author) *si quis aliquid ad exhæredationem Domini sui fecerit, & super hoc convictus fuerit, feodum quod de eo tenet, de jure amittet, & hæredes ejus* (e).

Having thus gone through the several Estates held by *common Socage*, I shall now briefly consider such *Tenures* as, upon my Division of *Tenure* into *Tenures* by *Knight-Service* and *Socage* only, fall under the Head of *Socage*, and are yet denominated and usually treated as particular *Species* of *Tenure*.

These are either *Burgage* or *Gavelkind*.

(d) 1 Inf. 251, 252.

(e) Vid. *Glanv. Lib. 9. Cap. 1. p. 68. b. Bract. Lib. 2. Cap. 35. Sect. 11.*

Bur-

205 *An Introduction to the*

Burgage (f) so called to denote the particular *Service* or *Tenure* of Houses or Tenements in ancient *Cities* or *Burroughs* (g), is most certainly a *Species* of *Socage Tenure* (h); inasmuch as such Tenements are holden either by a certain annual Rent in Money (i), or by some Service relating to

(f) *Burgage* was a *Norman*, as well as an *English Tenure*. *Vid. Custum. de Norm. fo. 48. a. 51. b.*

(g) *Burgagium est servitus quam qui Burga inhabitant pro Domiciliis suis præstant.* Somn. Gloss. ad X. Script. Verb. *Burgagium*———*Et est appel Tenure en Burgage, par ceo que les tenements deins le Burgh sont tenus del Seignior del Burgh per certain Rent, &c.* Lit. Sect. 164.

———And because the Service of the whole Borough was usually rendered as an *intire Farm* or Rent to the King, such Service, says Mr. *Madox*, was called *Burgage* or *Burgh-Service*. (*Vid. Mad. Hist of the Excheq. fo. 226. —231. & firma Burgi per tot.*) Thus in Scotland, *Burgage-holding* is, says Sir *Geo. Mackenzie*, that *Duty* which *Burghs Royal* are obliged to pay to the King by their Charters, erecting them in a *Burgh Royal*, and in this the *Burgh* is the *Vassal*, and not the particular *Burgesses*. *Macken. Inf. of the Law of Scotl. Lib. 2. Tit. 4. Sect. 9.*

(h) *Tiel Tenure (en Burgage) nest forsq; Tenure en Socage.* Lit. Sect. 164. Somn. Treat of Gov. 143. tho', according to *Nath. Bacon*, Tenants in *Burgage* were by their *Tenure* bound to the Defence of their *Borough*, which is in Account, says he, a Limb or Member of the Kingdom, and so in Nature of a *Castle-Guard*. *Bacon Hist. of the Eng. Gov. 298.*

(i) *Burgage* is no more than a yearly Rent, whereby Men of *Cities* and *Boroughs* held their Lands and Tenements

to Trade (k), and not by Military, (l) or other Service, that had no such Relation (m).

The Qualities of this Tenure vary according to the particular Customs of every *Borough* (n), and that without Prejudice to the feudal Nature of it; it being a *Maxim*, as to *improper*

ments of the King. or any other Lord. *Tayl. Hist. of Gav.* 171. *Vid. Old Tenures Tit. Burgage & Lit. Sect.* 162, 163, 164.

Burgagium est servitus, quæ——plerumq; constat in Denariis quibus solutis Burgenfis ab omni alia liberatur servitute, &c. Somn. Gloss. ad X. Script. Verb. *Burgagium*. For anciently (says Mr. *Lambard*) when our Kings used not to receive Money of their Lands, but Viſtuals for the necessary Provision of their House, Money was raised out of the *Cities* and *Castles*, in which Husbandry and Tillage was not exercised, towards the Payment of the Soldiers Wages, and such like Charges. *Lamb. Peramb. of Kent.* 227, 228.

(k) As to repair the House of the Lord, &c. 1 Inf. 109. a.

(l) *Burgagium——ad Militiam non pertinet, habeturq; ideo inter ignobiles tenuras.* Spelm. Gloss. ad. Verb. *Burgagium*.

(m) *Burgage* is a *Tenure* no way smelling of the Plough or Tillage, being current and conversant in *Cities* and *Towns*. Somn. Treat. of Gav. 142, 148.

(n) *Tenures par Bourgage gardent les Coustumes des Bourgh.* Custum. de Norm. 48. a. 51. b. *Vid. Lit. Sect.* 165, 166, 167. Crag. de jur. Feud. 68.

207 *An Introduction to the*

FEUDS especially, that *Lex aut consuetudo loci est observanda* (o).

The Properties of *Gavelkind Tenure* are so many, and the Qualities of it so different from those of any other *Tenure*, that it seems to have been doubted (p), whether it be a *Tenure* of a feudal Nature or not : It is certain that the *Gavelkind* 'Tenant retains strong Marks of *Propriety*, as Power to alien, even at the Age of Fifteen (q), Freedom from Forfeiture for Felony (r), and many other Privileges (f) unknown to Persons holding

(o) Vid. Sup. p. 37.

(p) Vid. Spelm. Treat. of Feuds 12, 38. & Gloss. ad Verb. Gaveletum.

(q) Vid. Lamb. Peramb. of Kent 614, 633, 643. Somn. Treat. of Gav. 8, 9.

(r) Lamb. Peramb. of Kent 634, 635.

(f) It has been doubted whether the *Gavelkind* Tenant's Power of Devising, before the Statute of Wills, was not a Privilege and Property of *Gavelkind Tenure*; but it is now agreed, that such Power was not a Quality of *Gavelkind*, but a Privilege advanced by particular Customs, collateral and foreign to the Custom of *Gavelkind*. (Vid. Somn. Treat. of Gav. 151.—172. 1 Lev. 80. 1 Syd. 135, 138. 2 Syd. 153. Cro. Car. 561.) And yet considering a Devise as a kind of Alienation, (*extranei Heredis*

Law of Tenures. 208

holding their Lands by any other Kind of *Tenure*: And it is as certain, that the *Tenure* is strictly Feudal, and, like the more usual *Tenures* by *Knight-Service* and *Socage*, denominated from the Kind or Nature of the prevailing Service; which was, as the Name imports, Tributary or Censual; the Word *Gavelkind* being (as Mr. *Somner* hath, with great Labour and Learning, proved) (t) a Compound of the *Saxon* Words *Gavel* (variously written *Gafol* or *Gable*) and *Gecynde*; the former whereof signifies Tribute, Tax (u), or Rent (x), and the latter Kind, Sort or Quality: So that the two Words put together, suggesting something of a *censual* Nature, do, when applied to Lands, directly import that such

Hæredis institutio est quasi Alienatio. Crag. de jur. Feud. fo. 13.) the *Gavelkind* Tenant's Power of Devising might possibly be inferred from his ancient Power to alien.

(t) Vid. Somn. Treat. of Gav. fo. 12.—35, 37.

(u) Seld. Jan. 129. Benson's Vocabular. Anglo-Sax.

(x) 1 Inf. 142. a. 2 Inf. 402.

Lands

209 *An Introduction to the*

Lands are *Censual* or *Rented* (y) : And yet we are not, says Mr. *Somner*, to perswade ourselves that *Gavelkind* Land was *Censual* only, or that it was not, or is not in its Nature, liable to any other Kind of Service, there being many Evidences still extant, that sufficiently prove the contrary (z).

Supposing this Etymon to be altogether as true as it is rational, it must be allowed, that *Gavelkind* doth not (more than *Socage*) *ex vi termini*, import any thing inconsistent with or contradictory to the Nature of a FEUD or *Fee*, but that it doth simply denote

(y) The several Opinions advanced before Mr. *Somner's* Time, concerning the Etymology of *Gavelkind*, are collected and answered by him in his Treatise of *Gavelkind*, fo. 3, 4, &c. and therefore need not here be repeated. — There is indeed a new Conjecture advanced by Mr. *Taylor*, in Opposition to Mr. *Somner*, which is very particular, and perhaps hardly worth our Notice; but yet, as it is new and particular, it may not be impertinent, barely to note it. *Gavelkind* then, in his Opinion, is a Compound of the *British* Words *Gasaël* (written in *English* *Gavel*) which signifies *Tenura* or *Hold* (from the *British* Verb. *Gasaëlu tenere, prehendere*) and *Cennedl*, which signifies *Generatio aut familia*, and that so *Gavel Kennedl* might signify *Tenura familias aut Generationis*. Vid. *Taylor's Hist of Gav.* 92,—98, 132.

(z) Vid. *Somn. Treat. of Gav.* 57, 58, 59.

a *Difference* arising from a particular or prevailing Service, and that it may therefore be a *Tenure* of a feudal Nature, as well as any other: And that it was really such, is apparent from the Obligations or Services of *Fealty* (a), and *Suit of Court* (b), which were always as clearly incident to this, as to any other *Tenure*: Besides, a *Gavelkind* Tenant is under much the same Penalty of *Cesser* (c), as strictly bound to perform all the Services of his *Tenure* as any other Tenant. Lands of this Nature do also *escheat*, and return to the Lord, for want of *Heirs*, though not for *Felony* (d); and even in Cases of *Felony*, if the Felon withdraw himself out of the Country, and be afterwards outlawed, or take sanctuary and abjure the Realm, the King is intitled to

(a) Lamb. Peramb. of Kent 614, 650.

(b) Lamb. *ibid.* 614, 639. Somn. Treat. of Gav. 57, 58.

(c) Lamb. *ibid.* 612, 647. Somn. Treat. of Gav. 38. and Taylor Hist. of Gav. 121, 122:

(d) Lamb. *ibid.* 610, 636, 637.

211 *An Introduction to the*

the *Year* and *Wast* of his Lands and Tenements, and the Lord may afterwards take to them as an *Escheat* (e): so that we may, without more ado, fairly conclude, that this *Tenure* is, like *Burgage*, a Kind of *Socage Tenure* (f), and that it is as really *Feudal* as any other *Species* of *Tenure*.

If this Conclusion be just, the Reader may possibly ask, how the Privileges and Qualities of this *Tenure* are then to be accounted for? The learned Mr. *Somner* declined this Question, as matter of Enquiry beyond his Skill, and therefore I shall not attempt to answer it; especially since it will serve my Purpose, altogether as well, to observe, that, if we consider 1st the great Variety of *improper* FEUDS (g); 2^{dly}, that *Fealty* is the only thing essentially necessary to the Being of such

(e) Lamb. Peramb. of Kent. 610. Custom of Kent ibid. 636, 637.

(f) Lamb. ibid. 585, 587. Bro. Tit. Tenure 72.

(g) Vid. Sup. p. 32.

FEUD (h); 3dly, that the *Gavelkind* Tenant's Power of Alienation is the *Difference* or distinguishing Property of all *alienable* FEUDS (i); And 4thly, that the grossest *Felonies* might, according to the *Feudists*, be remitted (k), and the Son's Right of Succession, in many Cases remain, notwithstanding the Fault of the Father (l); It will, upon these Considerations, sufficiently appear, that the principal Qualities of *Gavelkind* are adventitious, and that they might, without Preju-

(h) Vid. Sup. p. 32, 35.

(i) Vid. Sup. p. 33, 34.

(k) *Dominus potest Feloniam remittere. Zasius in Usus Feud. Cap. 10. fo. 95.——vel expresse, si verbis hoc declaretur; vel tacite, si non attento delicto nihilominus eum pro vasallo agnoscat, vel de culpa non conquestus moriatur. Stry. Exam. jur. feud. Cap. 23. Q. 45.*

(l) *Si vasalli delinquentis descendentes vel agnati ad feudum nomine proprio, non ex vasalli delinquentis persona venirent, ejusdem delictum ipsis non noceret, ut si statum ab initio Feudi Dominus vasallo feudum pro se, suis descendentes, & agnatis, nominatim concessisset, vel id ipsum vasallus in stipulationem expresse deduxisset——Deniq; si feudum ob eam causam alicui concessum fuerit, quod cedentem ab hostibus eripuerit, vel alias a morte liberavit, ex nullius delicti causa amitti, & per consequens Domino vel agnatis aperiri poterit. Hanne-ton. de jure feud. Lib. 3. Cap. 17. fo. 391.—393. Crag. de jure feud. 373.*

213 *An Introduction to the*

dice to its feudal Nature, have been communicated to any other *Species* of *Tenure*; and consequently that they do not, any of them, impeach the Truth of what I have hitherto suggested concerning the feudal Nature of this particular *Tenure*.

As for the famous *partible* Quality of most of the Lands in *Kent* (m), I will venture to say, that it was not a *particular* or *proper* Effect of *Gavelkind* *Tenure* (n): But that it was rather the ancient Course of *Discent* retained and continued in that *County* (o): And how particular soever the Con-

(m) Not all, for even in *Kent*, those ancient *Tenements* or *Fees*, says the Lord *Hale*, that are there held anciently by *Knight-Service*, are descendible to the eldest Son. *Hale Hist. of the Com. Law* 225. *Vid. Le Stat.* 31 *Hen. VIII. Cap. 3.*

(n) For the present *Tenure* only, says Mr. *Lambard*, (*Peramb. of Kent.* 592.) guideth not the *Discent*, but the *Tenure* and *Nature* (*i. e.* the ancient *partible* *Nature* of it) together do govern it.———And Mr. *Somner* (*Treat. of. Gav.* 89.) infers from *Glanvil* and *Bracton*, that it is a requisite and essential Property in Land of such (*partible*) *Discent*, that it is not only by *Nature* *partible*, but withal, that by *Custom* and of *Old* it hath actually been parted.

(o) *Vid. Somn. Treat. of Gav.* 89, 90.

tinuance

tinuance of this Course of *Discent* may appear to us at this Day, yet, if we consider *Gavelkind* as a *Species* of *Socage Tenure*; and that all *Tenures* by *Socage*, or of the Nature of *Socage*, were anciently in Point of Succession *divisible* (p); and that they might, without Prejudice to their feudal Nature, descend equally or otherwise, as best suited the Genius and Usage of every Country (q): It will appear much more extraordinary, that all other Counties should depart from this, the more ancient and natural Course of *Discent*, than that this particular County should retain it.

Having thus, I hope, in some Sort, discovered the Nature of *Te-*

(p) Vid. Sup. p. 176.

(q) *Calthrope* (in his Reading, shewing the Relation between Lord and Copyholder p. 22.) supposes this Custom to have prevailed in *Kent*, as best suiting with the Constitution or Circumstances of that County, which had been subject to foreign Invasions, and that the Inheritance therefore descended in *Gavelkind*, that every Man there might be of Power for Resistance.

215 *An Introduction to the*

nures, whether by *Knight-Service* or *Socage*, in the largest Sense, it remains only that I take some short Notice of *Copyholds*, which, because they fall not within my general Division, must be considered as a *distinct Species of Tenure*.

Copyholds then are the Remains of *Villénage* (r), which, considered as a *Tenure* (f), was not intirely *Saxon* (t), *Norman* (u), or *Feudal* (x), but a *Tenure* of a mix'd Nature, ad-

(r) Vid. F. N. B. 12. C. 1 Inf. 58. a. Bacon (afterwards Lord *Verulam*) Use of the Law 42, 43.

(f) The Author of the *old Tenures*, and *Littleton*, do both of them treat it not only as a *Tenure*, but as a *State of Bondage*. Vid. *Old Tenures and Lit. Tit. Villénage*.

(t) The Termination of *Villénage*, and the *Fealty* incident to the *Tenure*, prove that it was not *Saxon*, or prior to other *Tenures*; and therefore such Authors, as suppose *Villénage* to have been in *England* before the *Conquest*, must be understood to speak of it as a *State of Bondage*, and not as a real *Tenure*. Vid. *Somn. Treat. of Gav.* 65, 66. *Temp. Introd. to the Hist. of Engl.* 59.

(u) There is no Title or Hint of any such *Tenure* in the *Customier of Normandy*.

(x) For the *Feudists* make no Mention of any such *Tenure*, and therefore *Crag.* treats it as a *Tenure* peculiar to the *English*, & *quasi Scintilla servitutis apud Anglos adhuc latens*. *Crag. de jur. Feud.* 71. Besides *Livery* or *Investiture* is wanting, which is clearly necessary to every *Fee* or *Tenure*. Vid. *sup. p.* 37.

vanced

vanced upon the *Saxon Bondage*, and which gradually superseded it: So that we must look partly at Home for its Original, which, though it cannot be traced without running into greater Length and Nicety, than would be agreeable to my present Design, may possibly be hinted in a very few Words: For if the *Normans* found, as we are assured they did (y), “ A Sort of People among us
“ who were, as Sir *William Temple*
“ says, in a Condition of downright
“ Servitude, used and employed in
“ the most servile Works, and be-
“ longed, they, their Children and
“ Effects to the Lord of the Soil,
“ like the rest of the Stock or Cattle
“ upon it” (z); nothing is more likely than that they, who were Strangers to any other than a feudal

(y) Vid. Temp. Introd. 59. Bacon Hist. of the Eng. Gov. 56. Brady Gen. Pref. 26. & Spelm. Gloss. ad Verb. Servus.

(z) Persons of this Condition were called by the Saxons *Theow & Theowmen*, and in the Latin Laws of Will. I. (Cap. 65, 66.) and of Hen. I. (Cap. 77, 78.) *servi*.

217 *An Introduction to the*

State, should infranchise all such wretched Persons as fell to their Share, by admitting them to *Fealty* (a), in Respect of the little *Living*s they had hitherto been allowed to possess merely, as the scanty Supports of their base Condition; and which they were still suffered to retain upon the like Services, as they had in their former Servitude been used and employed in: But this Possession, as now cloathed with *Fealty*, and by Means thereof advanced into a Kind

(a) That the Admission of a *Bondman* to *Homage* or *Fealty* amounted to *Infranchisement*, appears from the *Mirror* (*Lib. 2. Sect. 28. p. 167, 168.*) *Devient serfs frank si son seignior preigne leur Hommage — ou susre son serf — jurour entre francs a foyer de frank Sachant —*. *Bracton* therefore mentions *Homage* as a Method of *Infranchisement* equivalent to *Manumission*, viz. *Tenementum nihil confert — personæ, nisi præcedat Homagium vel Manumissio.* Vid. *Bract. Lib. 2. Cap. 8. Sect. 1. fo. 24. b.* And this seems to be the true Sense of *Littleton, Sect. 206, 207.* where it is said, that if the Lord give his *Villein* any Lands in *Fee Simple*, *Fee Tail*, for *Life*, or for *Years*, it is an *Infranchisement*; but that a *Lease* at *Will* is not. The Reason is plain, because a meer *Tenant* at *Will* is not admitted to *Fealty*; whereas *Fealty* is incident to every other Estate, whether in *Fee*, for *Life*, or for *Years*.

of *Tenure* (b), differed very much from the ancient servile Possession, and was from henceforth called *Villenage* (c).

Our *Saxon* Ancestors again having, as above, submitted to the feudal Law, which was a Law of Liberty, may be supposed to have imitated, some sooner than others (d), the Generosity of the *Normans*, and to have done the like: But neither did

(b) Vid. Leg. Will. I. Cap. 29, 33.

(c) Such Tenant seems to have been first called *Vilain* in the *French* Laws of *William I.* (Cap. 29,) possibly from the *Latin* Word *Vilis* (Vid. Cowel Interp. and Skinner Etymolog. ad Verb. Villain). He was however, in the *Latin* of those Times, called *Villanus*, a *Villa*, quia in *Villa* habitavit, & operibus rusticis, plerumque sordidis, exercebatur. Vid. Spelm. Gloss. ad Verb. Villanus, & 1 Inf. 116. a. Such Tenant had no Freehold by the Course of the Common Law, (Lit. Sect. 81.) no Vote in the making of Laws (*Bacon Hist. of the Eng. Gov.* 56.) nor could he before the Statutes 1 Rich. III. Cap. 4. 11 Hen. VII. Cap. 26. and 19 Hen. VII. Cap. 16. be a Juryman (Vid. LL. Hen. I. Cap. 29.) nor was he really of any Account in the State; Propriety being the Basis of a feudal Policy in *England*, and of all the Rights as well as Obligations consequent to it.

(d) Sub *Ricardo secundo pars servorum maxima se in Libertatem vindicavit* (Vid. Spelm. Gloss. ad Verb. Lazzi, & Somn. Treat. of Gav. 58.) And yet there were *Bondmen*, or, as then called, *Villeins*, in the Time of *Hen. VII.*, as appears from the Stat. 19 H. 7. Cap. 15.

our

219 *An Introduction to the*

our *Saxon* or *Norman* Ancestors mean to increase or strengthen the Possession of their Villeins, but meant to leave that altogether as dependent and precarious as before, save only that, as by their Admission to *Fealty*, their Possession was put, in some Measure, upon a feudal Foot, their Lords could not, in regard to the *Fealty* implied on their parts (e), deal with them so wantonly as before; nor could they, so long as they answered the Services and Conditions of their Possessions or Tenure, in Honour or Conscience, deprive or remove them (f): And yet they were for a long Time left meerly to the Conscience

(e) The Obligations of *Fealty* being mutual, *ut sup. p. 12, 13. in Marg.*

(f) In this Respect therefore Sir *H. Spelman*, speaking of the Infant State of Feuds, when they were Precarious and Arbitrary (*ut sup. p. 14.*) says truly that, *Priscam eorum Naturam admodum apud nos hodie exprimit terrarum Conditio, quæ, ut loquuntur Forenses nostri, tenentur ad Voluntatem per Copiam Rotulorum Curie vulgo Copyholds nuncupata. Vid. Spelm. Gloss. ad Verb. Feudum & Felonia, & LL. Will. I. Cap. 33.*

of

of their Lords (g), which they might, as they could, awaken by their Petitions, but could not otherwise deal with; until the uninterrupted Benevolence and good Nature of the successive Lords of many Manors, having Time out of Mind permitted them, or them and their Children, to enjoy their Possessions in a Course of Succession, or for Life only, became at length customary and binding upon their Successors (h), and advanced such Possession into the legal Interest or Estate we now call *Copyhold* (i); which yet remains subject

(g) Until the Time of *Edw. IV.* and perhaps for some Time after, it appearing by *Littleton* (*Señ. 77.*) that it was, even in his Time, doubted, whether a Copyholder had any legal Remedy against his Lord.

(h) In some Manors as early as *Henry III's* Time. *Vide Calthrope Reading, &c. 3, 4, 7.*

(i) Copytenants, Copyholders, or Tenants *per Copy* ———— *d'ancien temps fuer' appellees tenants en Villenage* ———— *& ceo appiert per les aunciennes Tenures, &c. F. N. B. 12. C. Vide Bro. Tit. Villenage. 63.* ———— Tenants at Will, by Copy of Court Roll, being in Truth Bondmen at the Beginning, but having obtained Freedom of their Persons, and gained a Custom by Use of Occupying their Lands, they are now called Copyholders, and are so privileged, that the Lord cannot put them out, and all through Custom. *Bacon Use of the Law 43.*

to

221 *An Introduction to the*

to the same servile Conditions, and Forfeitures, as before, they being all of them so many Branches of that Continuance or Custom, which made it what it is.

From this View of the Original and Nature of *Copyholds*, we may possibly collect the Ground of the great *Variety* of *Customs*, that influence and govern these Estates in *different* Manors; it following from the preceding Account, if true, that they are no other than Customary Estates, after the ancient Will of the first Lords, as it is preserved and evidenced by the Rolls, or kept on Foot by the constant and uninterrupted Usages of the several Manors wherein they lie (k).

Having thus considered all the *Tenures* subsisting among us at this Day, I must now submit the Whole

(k) This I take to be the Sense of *Littleton*, *Sec.* 73, 75, 77. *Sed Quære.*

Law of Tenures. 222

of this Essay to the farther Enquiry and Correction of the Reader; advertising him only, that as the Attempt is new, and the Subject much obscured by Time, and Want of Contemporary Lights to clear it; the Author begs Allowances for Mistakes, and that the Reader will better inform him.

F I N I S.

APPENDIX

THESE ARE THE RESULTS OF THE
ANALYSIS OF THE SAMPLES
OBTAINED FROM THE
FOLLOWING PLACES
AND THE RESULTS
ARE GIVEN IN THE
TABLES WHICH
FOLLOW.

IN THE CASE OF THE
FOLLOWING SAMPLES
THE RESULTS ARE
GIVEN IN THE
TABLES WHICH
FOLLOW.

APPENDIX.

IT being said (Intro. p. 84, 85.) that the Charter of K. *John* materially varied from the *Capitula Baronum*, it may not be improper to point out an important Difference or two relating to *Escuage and Aid*, and the *Commune Consilium Regni*, by which they were to be imposed or assessed.

In the *Capitula* it is stipulated, *Ne scutagium vel auxilium ponatur in regno, nisi per Commune Consilium regni, nisi ad corpus regis redimendum, & primogenitum filium suum militem faciendum, & filiam suam primogenitam semel maritandam, Et ad hoc fiat rationabile auxilium. Simili modo fiat de tailagiis & auxiliis de civitate London, & de aliis civitatibus quæ inde habent libertates.*

APPENDIX.

In *Carta Johannis* it is declared, that *Nul-
lum scutagium vel auxilium ponatur in regno
nostro, nisi per Commune Consilium regni nostri,
nisi ad corpus nostrum redimendum, & primo-
genitum filium nostrum militem faciendum, &
ad filiam nostram primogenitam semel mari-
tandam, & ad hæc non fiat nisi rationabile aux-
ilium, simili modo fiat de auxiliis, de civitate
London. Et ad habendum Commune Consilium
regni de auxilio assidendo, aliter quam in tribus
casibus prædictis, vel de scutagio assidendo, sum-
moneri faciemus Archiepiscopos, Episcopos, Ab-
bates, Comites & Majores Barones sigillatim per
litteras Nostras, & præterea faciemus summo-
neri in generali per Vicecomites & Ballivos
nostros, omnes illos qui de nobis tenent in Ca-
pite ad certum diem, scilicet ad terminum qua-
draginta dierum ad minus, & ad certum locum,
& in omnibus litteris causam illius summonitio-
nis exprimemus, &c.* This Clause *et ad ha-
bendum Commune Consilium regni, &c.* is not
warranted by the *Capitula*, but is an Addition,
and a plain Departure from the true Sense of
the Words *Commune Consilium regni*, which was
from the Time of *William I.* to the Time of
K. John, and in the Beginning of the Reign
of *Henry III.* the name of the great Coun-
cil, or Parliament as now called, and consisted
of the same Members as in the earliest Time
of *William I.* and the Times before him, when
there were no *Tenants in Capite* or *Tenures* ex-
isting as a Branch of the national or govern-
ing

APPENDIX.

ing Policy of the Kingdom. Besides, it was an unnecessary, if a harmless Addition, the former Clause being absolute and complete, and agreeable to the Demands of the Barons; so that it is not to be supposed, or even imagined, that K. *John's* Declaration, in the Temper he then was, that he would summon *in generali* all his Tenants *in Capite*, excluding or overlooking all other *liberi homines regni*, was satisfactory to them, or that they acquiesced in such Restriction. None of the Monkish Historians of those Times, that I have met with, observe any Difference between the *Capitula* and the Charter of King *John*, nor between the Charters of K. *John* and of *Henry III.* nor do they take Notice of any Discontent upon Account of any Difference between them, but, on the contrary, *Mat. Paris* confidently affirms, that *Cartæ utrorumq; regum in nullo inveniuntur dissimiles*: Yet it is plain, from the Discord and Discontent subsisting during this Reign, and what followed in the Times of *Henry III.* and *Edward I.* that the Barons or *liberi homines regni* were not easy, till they were admitted to their Share or Footing in the *Commune Consilium*, which was at length obtained in the way of Representation by Knights, Citizens, and Burgeses chosen and authorized by them to meet and act for them. The precise Time or Manner of this Regulation, or the Inducements to it, do not appear, the Historians of

APPENDIX.

those Times being silent, and the Records lost or destroyed. It is however observable, that this Attempt of K. *John* to introduce a kind of Representation of all the *liberi homines regni* by his Tenants *in Capite*, tho' it did not take effect, shews that a kind of Representation, or rather Restriction of the *Commune Consilium*, was then thought of; and as a reasonable and proper Representation was no doubt a desirable Measure to prevent tumultuary, confused, and disorderly Councils, it can be no wonder that a proper Representation was soon after established. It appears by the Charter 1 *Henry III.* that the *Capitula in priori Carta* (*Johannis*) *de scutagiis & auxiliis assidendis* were among others *quæ gravia & dubitabilia videbantur*, at that Time in some Sort considered, and for their Weight and Importance resorted to a fuller Council. *Et tunc* (says the Charter) *faciemus plenissime tam de hiis quam de aliis quæ occurrerint emendenda quæ ad communem omnium utilitatem pertinuerint & pacem & statum nostrum & regni nostri.* Blackstone *Mag. Carta* 35, 36. And it does in some Measure appear, that the Consideration of them was not totally neglected 9 *Henry III.* for tho' the Charter 9 *Henry III.* is silent as to *Aids*, yet in respect of *Escuage* there is an express Provision, c. 37. that *Scutagium de cætero capiatur sicut capi tempore regis Henrici avi nostri consuevit.* It does not indeed appear by the Charter 9 *Henry III.* that the Regulation
or

APPENDIX.

or Restriction of the *Commune Consilium* attempted by King *John* was at that Time considered, there being no Mention of the *Commune Consilium* in that Charter; but, as the King was then young, and an Attempt to regulate or in any respect vary the *Commune Consilium*, might upon that Account be thought premature and improper, we may reasonably suppose, that it was again respited to the full Age of the King; for it is very certain, that the Representation by Knights, Citizens and Burgesſes took place sometime in this King's Reign, perhaps not many Years after his full Age; for tho' the first Summons of a *Parliament* (as now called, and probably so called soon after this Regulation) that is now extant or has been hitherto found, was 49 *Henry III.* (*Claus. 49 Henry III. dorf. 10, 11. Dugd. Summons to Parl. 1, 2, 3.*) yet the Form of Summons seems to have been at that Time well digested and known, and to have issued upon an Establishment of some standing; for the Writs are not entered at large upon the Roll, as Originals or Precedents generally are, but only Notes or Remembrances in the following Words: * *Item Mandatum est singulis Vicecomitibus per Angliam quod venire faciant duos milites de legalioribus & discretioribus militibus singulorum Comitatum ad regem London, in octabis prædictis in forma supradicta. Item*

* *Dugd. Summons 3.*

APPENDIX.

in forma prædicta scribitur Civibus Ebor' Civibus Lincoln' & cæteris Burgis Angliæ; quod mittant in forma prædicta duos de discretioribus & legalioribus & probioribus tam civibus, quam Burgensibus suis. But be this as it might, it must be observed, that from the Time of this Regulation, whenever it was, or indeed from the Time of K. *John*, we hear nothing more of a Representation by, or Restriction of the *Commune Consilium* to, the King's Tenants *in Capite*; so that we may reasonably conclude that all Differences upon this Head were satisfactorily composed by this Regulation.

But still there remained Cause of Uneasiness, because the *Capitula Baronum* and *Carta Johannis de auxiliis* were totally disregarded during this Reign, and nothing was done to quiet the Minds of the People in respect of *Aid* until 25 *Edward* I. when all Jealousies were silenced by the King's *Confirmatio Cartarum* under Seal, 5 Nov. 1297. and the Stat. 25 *Edward* I. which effectually revived and enforced the Declaration in King *John*'s Charter, that no *Aid* should be imposed or taken but by *Commen Assent de tut le roiaume*. Vide *Blackstone Mag. Carta*, 8vo. p. 80. St. 25 E. I. c. 5, 6.

I would not trifle upon a Subject so important, yet I cannot help observing from the
Lan-

APPENDIX.

Language of the old Statutes, *la Commune, tote la Commune d' Engleterre, le Commonaltie, tout le Comminalty, & Communaute de la terre, Communitas regni, Commen, Commen de tout le Royalme, Commen assent, Commen accorde, &c.* how tenacious and fond our Ancestors were of the Word COMMUNE, and that the Commons and Commonalty of *Great Britain* retain and glory in it at this Day.

E. J. M.